Demurrers

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
ALABAMA, TENTH JUDICIAL CIRCUIT

No. 25988

CITY OF BIRMINGHAM,

Plaintiff,

—VS.—

FRED L. SHUTTLESWORTH,

Defendant.

DEMURRERS

Comes the defendant, in the above styled cause, and demurs to the Complaint filed against him in this Court, and as grounds therefor assigns the following separately and severally:

1. That the allegations of the Complaint are so vague and indefinite as not to apprise the defendant of what he is called upon to defend.

2. That the Ordinance, under which said Complaint is brought and as applied to this defendant, violates Section 25, Article 1 of the Constitution of Alabama.

3. That the said Ordinance, under which this action is brought constitutes an abridgement of his right to apply to those invested with power of government for redress of grievances or other purposes, violative of rights secured to all persons by the First and Fourteenth Amendments to the United States Constitution.

4. That the said Ordinance is unconstitutional on its face and constitutes deprivation of liberty without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

5. That the said Ordinance, which is the basis of the complaint, constitutes an abridgement of the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the United States Constitution.

6. That to convict defendant under the said Ordinance, the basis of this complaint, would constitute a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

[fol. 5] 7. That the allegations of said complaint are mere conclusions of the pleader.

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.
Attorney for Defendant

FILED IN OPEN COURT
SEPT 28, 1963
JULIAN SWIFT
Clerk Circuit Court
By VD

[fol. 8]

Motion to Exclude the Testimony and for Judgment

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

No. 25988

STATE OF ALABAMA,
JEFFERSON COUNTY,
CITY OF BIRMINGHAM,

Plaintiff,

—VS.—

FRED L. SHUTTLESWORTH,

Defendant.

MOTION TO EXCLUDE THE TESTIMONY AND FOR JUDGMENT

Comes now Fred L. Shuttlesworth defendant in this cause after all of the testimony and evidence for the City of Birmingham has been given and received in this cause, and moves this Court to exclude said testimony and evidence and to give judgment for defendant, and as grounds for said motion set out and assign the following, separately and severally.

1. The City of Birmingham has not made a case against this defendant.

2. All of the testimony and evidence given in this cause indicates that defendant during the time and on the occasions in question merely exercises rights and privileges given to him as a citizen of the State of Alabama and of the United States of America, and by the First and Fourteenth Amendments to the Constitution of the United States of America.

3. There has been absolutely no evidence introduced by the City of Birmingham, to support the complaint or warrant in this cause.

4. All of the testimony and evidence offered by the City of Birmingham dose not prove defendant guilty of any criminal act or unlawful acts during the time in question.

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.
Attorneys for Defendant

FILED IN OPEN COURT
OCT 1, 1963
JULIAN SWIFT, Clerk Circuit Court By VD

[fol. 9]

Judgment Entry

Appealed from Recorder's Court
(Violation of Section 1159, General City Code)
Honorable Geo. Lewis Bailes, Judge Presiding

THE STATE,
CITY OF BIRMINGHAM,

—VS.—

FRED L. SHUTTLESWORTH.

This the 30th day of September, 1963, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorneys, Shores and Billingsley, and thereupon came a jury of good and lawful men, to-wit: H. D. Spivey and eleven others, who being duly empaneled and sworn according to Law, before whom the trial of this cause was entered upon and continued from day to day and time to time, said defendant being in open Court at each and every stage and during all the proceedings in this cause; the City of Birmingham files its written Complaint in this cause, and the defendant files demurrer to said Complaint, and said demurrer being considered by the Court, it is ordered and adjudged by the Court that said demurrer be and the same is hereby overruled, and the defendant files motion to quash the jury venire, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled; and the defendant being duly arraigned upon the written Complaint of the City of Birmingham, for his plea thereto says that he is not guilty. This the 1st day of October, 1963, the City rests and the defendant files motion to exclude, and said motion being

considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled; defendant makes motion to modify stipulation of counsel to present in evidence certain motion picture views, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled; and on this the 1st day of October, 1963, said jurors upon their oaths do say, "We the Jury, find the defendant guilty as charged in the complaint, and fix his punishment at a fine in the sum of $75.00 Dollars". It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in the complaint, in accordance with the verdict of the jury in this cause, and that [fol. 10] he pay a fine of Seventy-five Dollars ($75.00) and costs of this cause.

Said defendant being in open Court, and having presently failed to pay the fine of Seventy-five Dollars ($75.00) and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, the said Fred L. Shuttlesworth, perform hard labor for the City of Birmingham for forty (40) days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, the said Fred L. Shuttlesworth, perform additional hard labor for the City of Birmingham for ninety (90) days, as additional punishment in this cause.

Judgment Entry

And the costs legally taxable against the defendant in this cause amounting to Twenty-eight Dollars ($28.00), not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving Twenty-four Dollars ($24.00) taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for eight days, at the rate of $3.00 per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired that the City authorities return the defendant to the County Authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended, including the costs of feeding the defendant while in jail, for which let execution issue,

[fol. 11] This the 1st day of October, 1963, defendant files motion for new trial and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, defendant duly and legally excepts.

Notice of Appeal being given and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at Twenty-five Hundred Dollars ($2500.00), conditioned as required by Law, and defendant duly and legally excepts.

[fol. 12]

Motion for a New Trial

No. 25988

CITY OF BIRMINGHAM,

Plaintiff,

—VS.—

FRED L. SHUTTLESWORTH,

Defendant.

MOTION FOR A NEW TRIAL

Now comes the defendant, in the above styled cause and with leave of the Court first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit: *Oct. 1, 1963* and that this Honorable Court will grant the defendant a new trial, and as grounds for said Motion sets out and assigns the following, separately and severally:

1. That the verdict of the Jury and Judgment of the Court, in said cause, are contrary to law.

2. That the verdict of the jury and judgment of the court are contrary to the facts.

3. That the verdict of the jury and judgment of the court are not sustained by the great preponderance of the evidence in the case.

4. The Court erred in overruling the defendant's demurrers filed in this case.

5. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances, under which this defendant was charged and convicted, and as applied to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

[fol. 13] 7. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty without due process of law, in violation of the Constitution of the State of Alabama and the provisions of the Fourteenth Amendment to the United States Constitution.

8. The Court erred in overruling defendant's Motion to Exclude the evidence in this cause.

9. The Court erred in overruling defendant's Motion to Quash the Jury Venire in this cause.

10. For that the Court erred in overruling defendant's Motion to Quash the Venire on grounds that Negroes had

been systematically excluded therefrom, because of their race or color in violation of rights and privileges guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

11. For that the verdict of the jury is based on bias, prejudice and passion against defendant.

12. For that the Court erred in denying defendant's Motion to Declare void and illegal the petit jury drawn to try defendant in this cause, in that there were no Negroes serving on said petit jury.

13. For that the Court erred in denying defendant's Motion to Quash Venire returned against the defendant on the grounds that Negroes qualified for jury service in Jefferson County, Alabama, are arbitrarily systematically and intentionally excluded from jury duty in violation of rights and privileges guaranteed defendant by the Fourteenth Amendment to the United States Constitution.

14. For that the Court erred in overruling defendant's Motion to set aside the verdict of the jury and for judgment in this cause.

[fol. 14]

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.

Attorneys for Defendant

FILED IN OPEN COURT

OCT. 1, 1963

JULIAN SWIFT
CLERK CIRCUIT COURT

VD

Defendant's Refused Charge

DEFENDANT'S REFUSED CHARGES

The following charge was requested by the defendant, in the presence of the jury and before the jury retired, and was refused by the Court, said charge being in writing, and being endorsed separately and severally "Refused Bailes, J." and being in words and figures as follows, to-wit:

Defendant's requested Charge #1

If you believe the evidence in this case, then gentlemen of the jury, you should find the defendant not guilty.

Refused-Bailes, J.

[fol. 15]

Sentence

THE STATE OF ALABAMA,
JEFFERSON COUNTY.

APPEAL BOND—HARD LABOR SENTENCE

KNOW ALL MEN BY THESE PRESENTS, That we F. L. Shuttlesworth principal, and Jas. Esdale & Willie Esdale as sureties, are held and firmly bound unto the State of Alabama in the sum of Twenty Five Hundred & no/100 ($2500.00) Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents; and we and each of us waive our rights of exemption under the Constitution and laws of the State of Alabama as against this bond.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas, the above bounden F. L. Shuttlesworth was on the 1 day of Oct. 1963. convicted in the Circuit Court of Jefferson County, Alabama, for the offense of Parading Without A Permit—Gen City Code Sec No 1159 and had assessed against him a fine of $75.00 Seventy Five & No/100 Dollars, together with the cost of this prosecution, and on the 1 day of Oct. 1963, on failure to pay fine was sentenced to perform hard labor for the County for ..... days, and an additional term for the cost, at the rate of seventy-five cents per day, and as additional punishment imposed the defendant was sentenced to perform hard labor for the County for 90, from which sentence the said F. L. Shuttlesworth has this day prayed and obtained an appeal to the Court of Appeals of Alabama.

Sentence

NOW, IF THE SAID F. L. Shuttlesworth shall appear and abide such judgment as may be rendered by the Court of Appeals, and if the judgment of conviction is affirmed, or the appeal is dismissed, the said F. L. Shuttlesworth shall surrender himself to the Sheriff of Jefferson County, at the County Jail, within fifteen days from the date of such affirmation or dismissal, then this obligation to be null and void, otherwise to remain in full force and effect.

Given under our hands and seals, this the 1 day of Oct. 1963.

[fol. 16]

F. L. SHUTTLESWORTH (L.S.)
JAS. ESDALE (L.S.)
WILLIE ESDALE (L.S.)
By JAS. ESDALE, Atty in fact (L.S.)
ESDALE BAIL BOND CO (L.S.)
By JAS. ESDALE (L.S.)
Atty. in Fact.

Approved:

JULIAN SWIFT
Clerk of the Circuit Court of Jefferson County.

FILED IN OFFICE

OCT. 1, 1963

JULIAN SWIFT
Clerk

[fol. 17]

Transcript of Evidence

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR JEFFERSON COUNTY, ALABAMA

Case No. 25988

CITY OF BIRMINGHAM,

Complainant,

—VS.—

FRED SHUTTLESWORTH,

Respondent.

CAPTION

THE ABOVE ENTITLED CAUSE came on to be heard before the Honorable George Lewis Bailes, Judge Presiding, and a jury, on the 30th day of September, 1963, commencing at or about 3:00 P.M., Jefferson County Courthouse, Birmingham, Alabama, when the following proceedings were had and done:

APPEARANCES:

William C. Walker, Assistant City Attorney, City Hall; and Lewis Wilkinson, Assistant City Attorney, City Hall, for the Complainant.

Arthur Shores and Orzell Billingsley, Jr., Masonic Temple Building, Birmingham, Alabama, for the Respondent.

PROCEEDINGS:

The Court: Both sides ready?
Mr. Walker: We are ready.
Mr. Billingsley: Yes, sir.

The Court: And you want to present, first, the demurrer to the complaint?

Mr. Shores: Well, first the motion to quash venire. We submit on our demurrers.

The Court: I would hear you on the question of submitting them.

[fol. 18] Mr. Billingsley: Your Honor, we don't necessarily wish to argue the motion to quash venire, we are going to file another motion after the jury is empaneled, which I think will take care of some of the situation.

The Court: Very well, let the motion to quash venire be overruled.

Mr. Billingsley: We take exception.

The Court: And next would be the demurrer.

Mr. Billingsley: Yes, sir, the demurrer.

The Court: Let the record show the demurrer to the City's complaint is overruled.

Mr. Billingsley: We take exception, Your Honor.

The Court: Is this Case No. 25988?

Mr. Shores: That is right.

(Whereupon, a jury venire was sent for and entered the Court Room at 3:40 P.M., were duly qualified by the Court, identified, and special questions were asked by counsel on behalf of the respective parties and the following occurred:)

The Court: Now, the hour being what it is, what is the pleasure of counsel in the case?

Mr. Shores: We would like to recess until in the morning, Your Honor.

Mr. Walker: I have no objections to that, Judge Bailes.

The Court: Very well, in the morning. The next thing that the law requires me to say is please do not mention

the case to anyone of your brethren on the jury, nor to any member of the family, nor to anybody anywhere. Do not mention the case until you have heard all the evidence in the case and have retired to your room for deliberation, before you ever say anything about the case. With that little reminder, I bid you to be at leisure until 9:00 A.M. [fol. 19] in the morning.

(Whereupon, proceedings were in recess from 4:30 P.M., September 30, 1963, until 9:00 A.M., October 1st, 1963, and the following occurred:)

October 1st, 1963 9:00 A.M.

Morning Session

The Court: Counsel ready?
Mr. Walker: Yes, sir.
Mr. Billingsley: Yes, sir.
The Court: Let the jury be brought into the box.

(Jury brought in at 9:10 A.M.)

The Court: Good morning, everybody. Counsel ready?
Mr. Billingsley: We are ready.
Mr. Walker: We are ready.
The Court: I believe the jury was not sworn.
Mr. Walker: I don't think they were.

(Whereupon, the jury was sworn by the Court.)

The Court: Let the cause be stated. Is the complaint—I believe it is already filed.
Mr. Walker: Yes, sir.

(Whereupon, Mr. Walker addressed the jury in opening statement on behalf of the Complainant; following which Mr. Shores addressed the jury in the opening statement

on behalf of the Respondent; following which the following occurred:)

Mr. Walker: Your Honor, are we ready?

The Court: Yes, sir.

Mr. Shores: Judge, we would like the witnesses put under the rule.

(Whereupon, the rule was invoked on the witnesses; following which the following occurred:)

EVIDENCE ON BEHALF OF COMPLAINANT

Mr. Walker: Call Officer Higginbotham.

[fol. 20] R. N. HIGGINBOTHAM, called as a witness, being first duly sworn, was examined and testified as follows:

Direxat Examination by Mr. Walker:

Q. State your name, please.

A. R. N. Higginbotham.

Q. And occupation?

A. Police Officer for the City of Birmingham.

Q. And, Officer Higginbotham, how long have you been so employed?

A. Eighteen years next month.

Q. Now, what detail are you assigned to with the Police Department?

A. Traffic Division.

Q. Were you working for the Traffic Division on April 12th of this year?

A. I was.

Q. Is that Good Friday?

A. Yes, sir.

Q. Now, Officer Higginbotham, did you have an occasion to see or view a parade on that day?

Mr. Shores: Your Honor, we object to the term "parade". That is a legal conclusion. I think he could go into or frame his questions in such a way as to determine what happened or what he saw or did during the day.

Mr. Walker: Judge Bailes, parade has a well defined meaning and, if anything, would be an ultimate fact.

The Court: Let him answer the question.

Mr. Billingsley: He can ask the witness what happened. He doesn't have to use words of conclusion as to say that they were parading. It would be a conclusion on Mr. Walker's part.

The Court: The Court has ruled.

[fol. 21] Mr. Billingsley: We take exception.

Q. Officer, tell what you saw on that occasion, at that time.

A. I was sitting at 17th Street—at 18th Street and 5th Avenue, when the large crowd of people turned east on 5th Avenue from across the park at 17th Street, and also from 17th Street into 5th Avenue.

Q. Is that the first time you saw this group?

A. It was.

Q. And where were you at that time?

A. I was at the corner of 18th Street and 5th Avenue.

Q. And where was the group, again, please?

A. They was just coming on to 17th Street and 5th Avenue on the 5th Avenue side.

Q. And which direction were they traveling?

A. East.

Q. On which street?

A. 5th Avenue.

Q. Now, do you have any opinion as to how many people were in the group?

A. There was several hundred people.

Q. Several hundred.

A. Yes, sir.

Q. Were they in any kind of formation at that time?

A. There was a formation on the sidewalk on the north side of 5th Avenue. There was also a lot of people to the rear on the south side of the street that didn't seem to be in any formation, just sort of walking along.

Q. You didn't see this parade—

Mr. Billingsley: We object.

Mr. Walker: We withdraw that.

Q. You didn't see this group of people—where they came from, is that correct?

A. No, I didn't.

[fol. 22] Q. Now, what did you do when you saw them at that time, if anything?

A. I observed the crowd approaching. I heard singing going on—

Mr. Billingsley: We are going to object to this line of questioning, until he has tied this Defendant up.

The Court: Give him time.

A. I approached the middle of the block towards 17th Street. I crossed over to the block to the sidewalk with my motor. I got off my motor, and when they got close

enough to me I hollered in a loud voice, "Does anyone in this group have a permit"?

Mr. Billingsley: We object to that line of questioning.

The Court: Overruled.

Mr. Billingsley: We take exception.

Q. Did anyone in this group have a permit?

Mr. Billingsley: We object to that question.

The Court: Overruled.

Mr. Billingsley: We take an exception.

A. I received no answer from the parade at this time.

Q. Now, Officer Higginbotham, did you, at any time, see the Defendant in that group of people?

A. I did.

Q. Where did you see the Defendant?

A. The best I can remember, he was several—in the line across the sidewalk—he was several people back from the front.

Q. Was he in the group?

A. Yes, he was in the group.

Q. And what did you see the Defendant do, if anything?

A. I didn't see him do anything that anyone else wasn't doing.

Mr. Billingsley: We object and ask that that answer be stricken from the record.

The Court: Overruled.

[fol. 23] Mr. Billingsley: It's irrelevant, incompetent, and immaterial, and has nothing to do with the vital issues in this case.

The Court: Overruled.

Mr. Billingsley: Exception.

Q. Officer Higginbotham, who, if anyone, was leading this group of people?

Mr. Shores: Your Honor, we object to the framing of this question. We are not concerned with anyone but the Defendant. I think that the proper question is whether or not the Defendant was leading, would be the proper question.

The Court: Well, please let him answer.

A. I couldn't say who was leading, because they were all the way across the sidewalk and I don't know who was leading.

Mr. Walker: That is all.

Cross Examination by Mr. Shores:

Q. Officer Higginbotham, where did you first see this group of people that you speak of?

A. As it came on to 5th Avenue from 17th Street.

Q. Did you observe them coming through the park there?

A. No, sir.

Q. You just observed them as they came?

A. I was at the corner of 18th Street.

Q. And at the time how were they marching or walking?

A. They were four to six across the sidewalk all the way across the sidewalk on the north side of 5th Avenue leading east.

Q. And had the street been blocked?

A. No, it hadn't at this time.

Q. Was it ever blocked off at 5th Avenue between 17th and 18th Street, ever blocked?

A. No, now I don't know.

Q. Were you there all the time from the time that you observed them until the time they were arrested?

A. Yes, I was.

[fol. 24] Q. Did you—you don't know whether it was blocked off?

A. I couldn't see, there was some people in the way.

Q. Did you address the group yourself?

A. I did.

Q. And was there any bands along with them?

A. No.

Q. Was there any particular organized sort of formation?

A. The group on the sidewalk was.

Q. The group on the sidewalk was?

A. Right.

Q. What about the other group, I believe you said there was another group to the rear and to the side.

A. There was milling, and there was a large crowd approaching from the back of them. They were all over. They were gathering all the time on the street on the opposite side of the sidewalk.

Q. And who were the group gathering on the opposite side and alongside?

A. I didn't know any of them.

Q. Were they all the one race identity or were they white and black?

A. They were all black.

Q. Did you stop any of the other groups?

A. Everyone stopped at this time that I brought it to a halt, they did.

Q. How did you determine who was marching of the so-called marchers or paraders from the other group?

A. The group to the north side of the sidewalk headed east were signing. They were in—I wouldn't say exactly rows, but they were paired off in fours and sixes and they were the only group that there was singing, or any kind of formation.

Q. The group that was in the formation was paired off in fours and sixes, is that correct?

A. Right.

[fol. 25] Q. And I believe when you said you first observed this Defendant, he was back in one of the other groups?

A. He was in this group on the north side of the sidewalk headed east on 5th Avenue, but he wasn't exactly in the front row. The best I can remember he was in the, maybe, third or fourth row back.

Q. In the group on the opposite side of the street?

A. This was the group that was on the north side of 5th Avenue.

Q. And that was not the group singing?

A. Yes, it was.

Q. Was he part of that group and was he walking? Did you see whether or not he attempted to speak to somebody in this group?

A. That I don't know. I was so busy I don't even know whether he was singing or not.

Q. You don't know whether he was in the organized group, do you?

A. He was in the organized group.

Q. Was there somebody marching along beside, men in two's or three's or four's?

A. There was people around him at this time they was ahead of the other group.

Q. Where was he when you first saw him?

A. The first time that I noticed him was when I stopped the group.

Q. And where were you when you stopped the group?

A. Approximately in the center of the block between 17th and 18th on 5th.

Q. And at the time you stopped the group between 17th and 18th—

A. Approximately in the center of it.

Q. Where was this Defendant?

[fol. 26] A. The best I can remember, he was either two or three rows back from the front of the rows that were leading this, the front ones in the group.

Q. Was he on the outside, or within the group or just what was his position with respect to it?

A. I would say he was approximately in the center.

Q. And at the time you stopped him, were there other groups on either side of the so-called marching group?

A. To the rear, in the center of the street, and coming up on the opposite side of the street.

Q. The other group you speak of, was it out in the center of the street?

A. Yes.

Q. And they was people you speak of as marching there on the sidewalk?

A. Right.

Q. Did they have a band?

A. No band.

Q. Were there any vehicles in this marching group?

A. No.

Q. And all they were doing was marching and singing?

A. That is right.

Q. Did you personally arrest this Defendant?

A. I did not.

Q. Was he arrested at the time the others were arrested?

A. The whole group was under arrest.

Q. What happened to the group after they were placed under arrest?

A. At this time, several other motor scouts and three-wheelers and cars came up and blocked the street behind me. There were several that came up at this time to my assistance and at this time there was a lot of people had turned and started back toward 17th Street.

Q. Now, at that time, these people that were stopped and the other officers came up and blocked off the street, [fol. 27] that meant that no one could move out of the area blocked in, is that correct?

A. At this time I presume.

Q. Not what you presume, what you know and what you saw and did.

A. To the rear of me was blocked, because when I turned around to get on the motor there was several police cars across in back of me.

Q. And then the crowd or group of marchers were blocked in, were they not?

A. To the back of me at this time, they were.

Q. To the back of you at this time. Was this Defendant to the back of you or to the front of you?

A. At this time he was in front of me.

Q. In front of you?

A. Right.

Q. And where was he at that time when the rest of them were placed in patrol cars or buses or something?

A. At this time there was a lot of confusion going on.

Mr. Billingsley: We object to that answer and ask that it be stricken from the record.

The Court: Overruled.

Mr. Billingsley: Exception.

A. There was a lot of rock throwing.

Mr. Billingsley: We object to that. He is not answering the question.

Q. My question was whether or not these people were, whether they were escorted off to the city jail in the bus or in the regular city paddy wagon, and what happened to them at that time?

A. The best I can remember, the patrol wagons came up and we started putting them in the patrol wagons.

Q. Was this Defendant placed in the patrol wagon?

A. At this time, I don't know.

Q. Were you there?

[fol. 28] A. Yes, I was there.

Q. Had he left your view at that time?

A. I left the scene at this time.

Q. Where did you go?

A. I went to the opposite side of the street to assist some other officers.

Q. But you do know he was in the group that was blocked and held there until the patrol wagon was brought?

A. He was in the group that arrived there. Now, what happened to him after that, I don't know.

Q. Did you ascertain where the group was going?
A. No, I didn't.

Mr. Walker: We object to that as immaterial, where the group was going.

Mr. Shores: That is all, Your Honor.

Re-Direct Examination by Mr. Walker:

Q. Now, Officer Higginbotham, what time of the day was this?

A. The best I can remember, it was approximately 2:15 or 2:30.

The Court: P.M.?

A. Yes, sir.

Q. And at the time of this arrest, would you describe to the gentlemen of the jury the circumstances or the conditions that existed then?

Mr. Billingsley: Your Honor, we object to that.

Mr. Walker: Your Honor, they opened the door to that. We have a right to show what the circumstances were.

The Court: Please let the witness answer.

Mr. Billingsley: If Your Honor please, I don't understand the question when he talks about conditions and circumstances—

The Court: The Court has ruled.

Mr. Billingsley: We take exception.

[fol. 29] A. On the morning prior to this—

Mr. Billingsley: We object.

Q. Officer Higginbotham, I mean by the question at the immediate time of arrest, at 2:30 or thereabouts, what were the conditions prevailing at the scene of the arrest, just what was going on?

Mr. Billingsley: Your Honor, we object on the further grounds that this witness is not qualified to tell what was the conditions. I don't understand what condition he is talking about; the conditions in Bessemer or Houston, or about the weather. I don't see that Officer Higginbotham can answer that question and we object to that.

The Court: Overruled.

Q. Officer Higginbotham, just tell what you saw at the time of the arrest.

A. At the time of the arrest there was a lot of loud hollering going on, there was a lot of rocks being thrown, who threw them I don't know. I don't have any idea who threw the rocks, but I know there was a lot of rock throwing. There was a lot of dodging going on.

Mr. Billingsley: If Your Honor please, we would like to object and ask for a mistrial in the case, as his answer was for the purpose of attempting to confuse the men of the jury in this case. He says rock throwing and that type of thing; it needs to be stated about the witness: How does he know rocks were being thrown. Was he hit and what happened to them?

The Court: He will be subject to cross-examination.

Mr. Billingsley: We take exception.

A. And at the time right after we put them under arrest—who the officers were, I don't know—some officer hollers, "We got an officer in trouble". I looked and saw—

Mr. Shores: We certainly object to that. That has nothing to do with the proceedings.

The Court: This, in the intention of the question, was at the time and place of the occasion, or [fol. 30] occurrence, or incident, or episode.

Mr. Walker: Go ahead.

Mr. Billingsley: We take exception. Your Honor.

A. I ran directly across the street through the crowd of people, and at this time we had pushed back the crowd of people to help an officer that was in the crowd at this time. When I got back across the street, which was approximately five or ten minutes later, to the crowd, the other officers had all arrived and the crowd was being pushed back and I didn't know who was arrested or who was taken to jail.

Mr. Walker: That is all.

Re-Cross Examination by Mr. Shores:

Q. Officer Higginbotham, at the time you described what else was going on, did you arrest this Defendant and place any other Defendants under arrest for parading without a permit?

A. I didn't, no.

Q. Then this Defendant, as far as you could ascertain, and the parties you arrested, were not engaged in anything but marching and parading without a permit?

A. That is right.

Q. And that is what you arrested them for?
A. That is right.
Q. You didn't see him throw any rocks?
A. No.

Mr. Shores: That is all.
Mr. Walker: No further questions.

(Witness excused.)

The Court: Who do you have next?
Mr. Walker: Sarah Naugher.

SARAH W. NAUGHER, called as a witness, being first duly sworn, was examined and testified as follows:

[fol. 31] *Direct Examination by Mr. Walker:*

Q. State your name, please.
A. Sarah W. Naugher.
Q. And occupation?
A. Clerk in the City Clerk's office.
Q. And how long have you been so employed?
A. Seventeen years.
Q. And, Mrs. Naugher, what is this book that you hold in your hands?
A. Permit book.
Q. Does that book have any relation to permits for parades?
A. Yes, it does.
Q. What is the relation between that book and parade permits?
A. It contains the carbon copies of the parade permits.
Q. And is part of your duty to keep that book?
A. Yes.

Q. Is that an official book of the City?

A. Yes, it is.

Q. Now, I will ask you if there was any parade permit for any Friday, issued for parades to be held on April 12th?

A. No.

Mr. Billingsley: If Your Honor please, we would like to object to the question on the grounds that the testimony to be given by Mrs. Naugher is irrelevant and incompetent, and immaterial and it has not been established by the City of Birmingham that there was a parade on the date that you were talking about, and I don't see where it has, this whole thing has any relevancy in this case.

The Court: Overruled.

Mr. Billingsley: We take exception.

Q. Was there any permit issued for any parade on April 12th?

A. No.

Q. Was there a permit issued for any procession on that day?

[fol. 32] A. No, sir.

Q. Does that book contain all of the permits that has been issued for parading during the past year?

A. Yes.

Mr. Walker: That is all.

Cross Examination by Mr. Shores:

Q. Mrs. Naugher, does that book show the applications refused for permits to parade?

A. No.

Q. Only those issued?

A. Yes.

Q. Do you have a list of permits issued between September—what period does that book cover?

A. It covers from 1951 to 1963.

Q. And do you have the list of permits issued between January 1st, and June 1st?

A. Yes.

Q. Would you please list them for me?

A. The Mutual Aid Society of Groveland Baptist Church on March 3, 1963, Mount Pilgrim District Congress on April 11th, and the Central Park Baseball Association on April 15th.

Q. Now, Mrs. Naugher, does the permit indicate the route over which the parade is to take?

A. Yes.

Q. And does it indicate the number of vehicles that are or that there will be vehicles?

A. No.

Q. Does it indicate whether it is going to be on the sidewalk or out in the street?

Mr. Walker: We object to this, unless it is to be shown that the Defendant has the permit.

Mr. Billingsley: The crucial question is: What is a parade. That is the question we have got to determine, whether or not these persons were engaged in a parade or a procession, and the only [fol. 33] way we can find out is by questioning the witnesses to determine whether or not it is a parade.

The Court: Just go along and ask the witness whatever you care to.

Q. Does the permit show whether or not it was given to parade on the sidewalk or out in the street?

A. No.

Q. Mrs. Naugher, I believe you said you have been clerk for seventeen years.

A. Yes.

Q. You have seen a number of these parades, haven't you?

A. Yes.

Q. Have you noticed a parade down the streets or on the sidewalk?

A. In the streets.

Q. All in the street?

A. Yes.

Q. And did you notice whether or not these parades would have bands or vehicles in the procession?

A. Yes.

Q. They would?

A. Yes.

Q. And does one get a permit to picket, or just to parade?

A. No.

Q. Does one get a permit to just walk down the street?

A. No.

Q. Do you know whether or not at time when a group of Boy Scouts or Girl Scouts were going to load up on the bus, whether or not they would have to get a permit to get to the bus?

The Court: That would be a legal question and she wouldn't be competent.

Mr. Billingsley: The vital question is whether or not—what she has in the book there.

A. We have not issued any.

[fol. 34] Q. I believe the City Auditorium—

The Court: We will leave the arguments until we come to the arguments after all the evidence is in.

Q. Have you seen students attending the symphony, walking from the bus to the auditorium?

A. Yes.

Q. Does your book show whether or not they got a permit?

Mr. Walker: We object.

The Court: Sustained.

Mr. Billingsley: Exception.

Q. Do you know whether or not a permit was issued in the early part of September when a number of automobiles paraded up and down the street?

Mr. Walker: We object to anything that happened after the case.

The Court: Sustained.

Mr. Billingsley: Exception.

Mr. Walker: Judge Bailes, Mrs. Naugher is due in the council meeting. Would it be all right for her to leave?

Mr. Shores: We have no objection.

The Court: She may. Who do you have next?

(Witness excused.)

Mr. Walker: Officer Ratigan.

EDWARD RATIGAN, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Walker:

Q. State your name, please.

A. Officer Edward Ratigan.

Q. And your occupation?

A. I am a Police Officer for the City of Birmingham.

Q. How long have you been so employed?

A. Eighteen years.

[fol. 35] Q. Were you so employed on April 12th?

A. I was.

Q. What was your duty on that date?

A. I was stationed in front of the church in the 1400 Block of 6th Avenue North to inform the radio on the activities going on at the church.

Q. What time did you get to the church?

A. I just don't remember, I don't recall at all.

Q. Were you there approximately at 2:00, or a little after?

A. I was.

Q. Now, what, if anything, did you observe at the church at that time? Just tell the jury what, if anything, you saw and heard.

Mr. Shores: Your Honor, we object to what he saw and observed at the church. This parade is supposed to be on the street or the sidewalk.

Mr. Walker: Your Honor, we don't want the evidence—it will show the parade.

Mr. Billingsley: We object to the use of the word parade.

Mr. Shores: We except.

Q. Tell the jury, the gentlemen of the jury, and the Court what you saw on that occasion at the church, and thereafter.

A. Approximately around 2:30 I observed Martin Luther King and A. B. Abernathy and Fred Shuttlesworth and a white man I don't know, leaving the church at the 1400 Block. They came out of the church and marched in two's traveling east on 6th Avenue North in the 1400 Block. They proceeded east down to, down 17th Street. They turned, they turned south on 17th Street to 5th Avenue and then turned east again on 5th Avenue and were stopped in the 1700 Block of 5th Avenue North. During this time they were marching two abreast and they were singing.

Q. And were they in formation?

A. They were in a formation.

[fol. 36] Q. And did you see the Defendant in that group?

A. I observed the defendant from the 1400 Block of 6th Avenue North to the corner of 6th Avenue and 17th Street. When I made the turn I lost the Defendant momentarily crossing in the 1700 Block and 6th Avenue. I picked the Defendant up again within the group in the 1700 Block of 5th Avenue at the corner. He was in the group in the 1700 Block of 5th Avenue, when I went up to make the arrest.

Q. You didn't see him at the time the arrests were made?

A. I did not see him at the time the arrests were made.

Q. Let me see, where is the church located?

A. The church is located on the North side of 6th Avenue within the 1400 block.

Q. On the north side of 6th Avenue within the 1400 Block?

A. Yes.

Q. Officer Ratigan, would you come down and draw a diagram of the route—let's pull this out here. Draw the route this procession or group of people took.

A. (Drawing on blackboard)

Q. Now, Officer Ratigan, where did you first observe the Defendant and the others that you named, King and Abernathy, and Shuttlesworth? Where were they when you first saw them?

A. The first time I saw them on this occasion was coming out of the church on the 1400 Block of 6th Avenue North.

Q. And which direction did they proceed?

A. They came out of the church, marched down the sidewalk, marched along—I was originally here (indicating), cut accross and I followed them on this side of the street (indicating). I followed them down all the way down and they turned here (indicating).

Q. Which direction did they turn?

A. They turned south. It was approximately within this point here (indicating) I lost the Defendant. I came [fol. 37] across him here, and I picked him up, approximately, in here again.

Q. I see. What street did they turn south on? 17th Street is one block south of 6th Avenue North. What street would that be or what avenue?

A. That is 5th Avenue North.

Q. Did you ever see the Defendant on 17th Street?

A. Oh, yes. I picked the Defendant somewhere along in the point here (indicating), and lost him again over here because of this group marching along in here, and

they turned and went east in this group here, and I lost him here, (indicating), somewhere in here, almost to the corner.

Q. Describe the formation you observed this group of people to be in when they left the church, or as they walked along 6th Avenue North.

A. They were marching two abreast and they were approximately forty inches apart.

Q. Who was leading, or who was in front of the group, if you know?

A. There was Martin Luther King was one of the first ones, I don't recall the other one. And directly behind one of the first was this white man, who was the second one on the right hand side. If my memory serves me right, A. D. King was one of the second ones. Fred Shuttlesworth, when I first observed him, was up near the front. He was not in any particular formation of two's. He was alongside of them and as they proceeded down the avenue within the point here, (indicating), approximately in here (indicating), he appeared to be drawing back and giving encouragement.

Mr. Shores: We object to drawing back and giving encouragement.

The Court: Yes, I think what you heard him say, what happened, what you saw him do, would be permissible.

A. He was talking to the crowd, but I did not hear what the Defendant said.

[fol. 38] Q. How many blocks, all told, that you observed the Defendant with the group?

A. Taking into consideration the point that I lost him, I would say approximately three and a half blocks. That

half a block in here (indicating), and that would be one and two (indicating) and I lost him in here and picked him up again in here (indicating). That would be about three blocks, but I lost him entirely in here (indicating).

Q. What was the total distance you observed the group that included the Defendant?

A. I observed the group all along until they came into the 1700 Block, and they were stopped in the 1700 Block of 5th Avenue.

Q. Now, just have a seat, Officer Ratigan.

A. (Witness resumes witness stand.)

Q. Officer, would you describe how the Defendant Fred Shuttlesworth was dressed on this occasion?

A. The Defendant was wearing a black shirt with blue-jean trousers.

Q. Would you describe how Martin Luther King was dressed on this occasion?

Mr. Shores: We object to how he was dressed. He is not on trial. It is irrelevant and incompetent.

Mr. Walker: This is to show that they were acting in unison.

The Court: Let him answer.

A. He was wearing a black shirt and bluejeans as trousers.

Q. And how was Abernathy dressed?

A. The same way.

Q. Did you observe other people on that occasion in similar dress?

A. I don't recall. I don't really recall.

Q. Let me ask you this, were these leaders of the group or the formation?

[fol. 39] A. They were.

Q. And I will ask you if—what is the profession of the Defendant, if you know?

A. I just know what I read in the paper, he is supposed to be a Reverend.

Q. And what is the profession, if you know, of Martin Luther King?

A. He is supposed to be a preacher.

Q. And Abernathy?

A. I am not sure about Abernathy.

Mr. Walker: That is all.

Cross Examination by Mr. Shores:

Q. Officer Ratigan, I believe you said you observed this Defendant, along with others, from the time they left the church, to the time they were stopped by an officer, and were arrested, is that correct?

A. Right.

Q. And you described the formation as two abreast about forty inches apart, is that correct?

A. That is right.

Q. And that formation persisted from the time they were apprehended or stopped?

A. It did.

Q. And during this time were there other people on the side or behind, walking along the side of these people who were in formation?

A. There were.

Q. And I believe you also stated that this Defendant at no time was in line with a partner, marching two abreast, but he was alongside the line of marchers; is that correct?

A. That is right.

Q. And that was when he moved from your sight, is that correct?

A. It was twice.

[fol. 40] Q. Now, at any time did this formation group themselves into four's and six's?

A. No.

Q. At no time, from the time they began and from the time they were marching alongside in two's, approximately forty inches apart?

A. That is right.

Q. Did you ever get close enough to this Defendant to hear what he said, as he was walking alongside the marchers?

A. No.

Q. You don't know whether he was telling people keep quiet and be orderly or what?

A. I do not.

Q. You did see him speak, from time to time, as he walked along beside the line of marchers?

A. I did.

Q. And his position was no different from that of other persons that walked alongside of the marchers, is that correct? There were others who walked alongside the way he walked?

A. Not the way he walked, no.

Q. He was not in line or in a definite place as the others you saw? He went from place to place, is that right? Is that right, in the line he went from place to place?

A. That is right, but the other people that were talking were away from the curb, were nearer to the houses or to the avenue, whereas the Defendant was to the curb side of the street.

Q. I see, but he was not in the lines of two's?

A. He was not in the line of two's.

Q. And at this time they didn't have any brass band leading them?

A. No.

Q. And they were on the sidewalk, were they not?

A. They were.

[fol. 41] Q. Will you describe just what they were doing, as they marched along the sidewalk.

A. All I recall is that they were marching two abreast. I don't even recall if they were singing.

Q. And they were orderly as they were marching along?

A. Yes.

Mr. Shores: That is all.

Re-Direct Examination by Mr. Walker:

Q. Officer Ratigan, let me ask you one question. In your opinion, how many people were in the formation?

A. When I radioed to the Police Headquarters, I had counted 52 people that had left the church in pairs of two.

Q. And is that all?

A. That is all.

Q. Did you say 52 persons or 52 couples?

A. 52 persons. This was in two's and I counted about 23.

Q. And this group that has been referred to, were they merely spectators?

A. You mean the ones that were marching?

Q. Were there any spectators?

A. There were spectators, oh, yes.

Q. Were those spectators a part of this formation, at this time, when you observed them?

A. No part of them.

Q. What was their relation as compared to the relation of this Defendant to the group that was marching? What was their difference?

A. There were spectators lined up along 6th Avenue up to along the point of the houses, and as this group would march—and the Defendant was to the curb side of the group—then as the group would pass them, the spectators would follow from the rear.

Q. Which side were the spectators on of the formation? [fol. 42] Were they on the side toward the buildings or toward the street?

A. They were toward the buildings.

Q. And which side was the Defendant on?

A. Toward the Street side.

Q. Was he with anybody besides himself?

A. He was just going down the line with the rest of them after he left the church. He was one of the three then, and as they walked along he appeared to be talking to them.

Mr. Walker: That is all.

Re-Cross Examination by Mr. Shores:

Q. I believe you said you did follow the line of marchers until they were arrested?

A. That is right.

Q. Did you participate in the arrests?

A. I participated in the arrests.

Q. Was this Defendant arrested there, at that time?

A. He was not.

Q. He was not arrested along with the others that were?

A. He was not.

Mr. Shores: That is all.

(Witness excused.)

The Court: Who do you have next?
Mr. Walker: Officer Evers.

HERMAN EVERS, JR., called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Walker:

Q. State your name, please.
A. Herman Evers.
Q. And what is your occupation?
[fol. 43] A. City of Birmingham Police Department.
Q. How long have you been so employed?
A. Around ten years.
Q. Now, on April 12th of this year, Officer Evers, what was your detail?
A. I was in the—I was detailed to the downtown area to work and watch for demonstrations that was to take place that afternoon.
Q. Let me ask you this: Where were you—first, is April 12th Good Friday?
A. Yes, sir.
Q. Would you tell the jury and the Court where you were at approximately 2:15 and 2:30 on Good Friday of this year?
A. I was assigned to watch a church in the 1400 Block of 6th Avenue in the City of Birmingham.
Q. And would you—let me ask you this: On that occasion did you see this Defendant?
A. Shuttlesworth?
Q. Yes.
A. Yes, sir.

Q. Do you know the Defendant in this case?

A. Yes, sir.

Q. And how long have you known him?

A. I have known him for about five or six years.

Q. How long did you know him when you saw him, and did you know him when you saw him on that occasion?

A. Yes, sir.

Q. How long have you known him by sight?

A. About five or six years.

Q. Now, where was the Defendant when you first saw him on Good Friday about 2:00 or after?

A. He and one other came up in a car. They got out of the car and walked into the church about 2:05, or somewhere around in there.

[fol. 44] Q. When did you next see the Defendant?

A. When he came out of the church leading the demonstration, approximately 2:30.

Q. How was the Defendant dressed on that occasion?

A. When I first saw him, when he got out of the car he was dressed in a suit. When he came back out he was dressed in bluejeans, pants and jacket, I believe.

Q. In other words, he was dressed differently when he came out of the church?

A. He was dressed differently, yes, sir.

Q. Did you observe a group of people coming out of the church at the same time the Defendant came out?

A. They followed him out, yes, sir.

Q. Who was leading the group of people?

A. Well, there was King and Abernathy and Shuttlesworth?

Q. Which King?

A. A. D. King, I believe.

Q. It was A. D. King that you saw? Now, tell the Court and the gentlemen of the jury how these people were dressed?

A. Best I can remember, they also were dressed in this bluejean attire.

Q. Now, describe the formation, if any, that the group was in.

A. It was a simulated formation. They came out and started walking east on 6th Avenue on the sidewalk in groups of two's and pairs of two's, in a group strung out.

Q. Now, did you see the Defendant on this occasion?

A. I did.

Q. And was the Defendant with the formation?

A. He was in the front, yes.

Q. When was he in the front?

A. From the time he walked out of the church, until the last time I saw him. The last time I saw him was in the 600 Block of 17th Street. I believe it was there by the park.

[fol. 45] Q. Did you see him all the time?

A. On spot occasions as I was riding along with them.

Q. Now, how many, in your opinion, was in this formation; how many people?

A. We counted as they came out and it was approximately 52, when they came out of the church, at that time.

Q. Was there many spectators in the area, at that time?

A. Yes.

Q. Did the spectators join the formation?

A. At a distance.

Q. Where did they joint it?

A. As they crossed it they were on—the church is on the north side of the avenue and the spectators were

standing on the south side and thereabouts. As they crossed 15th Street that is where the spectators started coming in and joining them.

Q. Did they follow them, or did they actually join the group or formation?

A. They were following them.

Q. How many was—of the spectators, were in the group following the procession?

A. In number?

Q. Do you have any opinion as to that?

A. To me it looked like over a thousand.

Q. And they were—what were they doing?

A. They were following behind them singing, just loud comments and talking and all that, just generally a disorderly type crowd.

Q. Officer Evers, let me ask one other question. How long was—what was the distance that this formation traveled, that you observed them? What distance did you observe them traveling?

A. From the church up to 17th Street. They made a right turn at 17th Street and then came to 5th Avenue, and that is where I arrested them, in the 1700 Block of 5th Avenue, about the middle of the block.

[fol. 46] Q. Let me ask you this: Did this Defendant make the turn? Did you see him after the formation turned south on 17th Street?

A. The last time I saw him was when the formation turned south on 17th Street. As I passed them going up to 5th Avenue, after he was there at the Kelly Ingram park.

Q. Did he turn south or do you know?

A. Yes, sir, he was there at Kelly Ingram Park.

Q. Was Kelly Ingram Park on this diagram? You can come down.

A. (Witness goes to blackboard.)

Kelly Ingram Park would be in this area (indicating).

Q. Where was the Defendant, approximately, the last time you saw him?

A. Approximately, in the middle of the block.

Mr. Walker: That is all.

Cross Examination by Mr. Shores:

Q. Officer Evers, I believe you said you observed the Defendant when he went into the church?

A. I did.

Q. He went in dressed in one attire and came out in another?

A. That is right.

Q. Did you see anybody else go in one way and come out dressed another?

A. Yes, sir.

Q. And you also saw him coming out leading this group of fifty something persons?

A. He and King and Abernathy.

Q. They were in two's, is that correct?

A. Groups of two.

Q. Do you recall who his partner was, if he had a partner?

A. He was in front talking to King and Abernathy.

Q. He was on both sides, first one side and then the other?

[fol. 47] A. Yes, sir. King was on one side and Abernathy was on the other.

Q. And at all times he was at the front?

A. No.

Q. Will you describe his conduct at other times during the procession?

A. His conduct was in a frantic conduct, such as bounding from the front to the rear and waving his arm to come on, telling them to come on.

Q. Did you hear him tell them to come on?

A. Yes, sir.

Q. Was he telling the marchers to come on?

A. Both.

Q. And did you hear him saying anything else about keeping quiet and orderly?

A. No.

Q. All you heard him say was to wave his arms and tell them to come on?

A. That is correct.

Q. How close were you at that time?

A. I was riding on the north side of the street. There were cars back there, and they were on the sidewalk. That is how close they got.

Q. They were on the sidewalk, and you were out in the street riding your motor bike?

A. Motorcycle, yes.

Q. And what were these marchers doing as they left the church until the time they were stopped between 17th and 18th Street on 5th Avenue?

A. Clapping their hands, and singing, and shouting and things like that.

Q. They were not just walking along?

A. Not just walking along the street, no.

Q. I see. And was Ratigan one of the Officers that [fol. 48] assisted in the arrest, Officer Ratigan?

A. Yes, sir.

Q. And did you see him during this time?

A. Yes, sir.

Q. And what was he doing during this time?

A. He was stationed in front of the church at the beginning.

Q. He was stationed in front of the church.

A. Yes, sir.

Q. And when he was stationed in front of the church, did he move along as they marched up the street?

A. Yes, sir.

Q. And if he stated that all they did was just walk along, he was wrong in stating that they didn't do anything else?

A. That is his statement, not mine.

Q. He wouldn't be telling the truth?

Mr. Wilkinson: We object, that would be improper.

The Court: That would be argumentative.

Q. Did you stop them as they reached a point between 17th Street and 6th Avenue?

A. I did.

Q. What did you do when you stopped them, and what did you say, and what did you do?

A. I pulled my motorcycle along the sidewalk, and King and Abernathy dropped down on their knees. And somebody asked them if they had a permit, and nobody answered, and we put them in the wagon.

Q. Was the Defendant there at that time?

A. No.

Q. What was your detail on April 12th, Good Friday of this year?

A. I was assigned to make pictures for the City of Birmingham.

Q. Now, were you assigned—where were you on Good Friday about 2:15 or 2:30?

A. I was in front of the church on 6th Avenue, between 14th and 15th Street.

Q. Now, would you tell the gentlemen of the jury what you observed on that occasion, at that time?

A. Of course, I had been down there sometime before. There was a meeting going on in the church, and approximately at that time they began to come out the front. [fol. 50] They turned to their left, and behind them the marchers, and they marched to 17th Street, and there they turned across the street beside the park, turned to their right and went across the street on 5th Avenue, turned to their left and went on up and directly to in front of the Auto Rental business where they were stopped.

Q. And did you have an occasion to—did you see this Defendant at the time you observed people coming out of the church?

A. I did.

Q. Did they—of the people you observed, did they form any type of formation?

A. They came out of the church in a formation.

Q. Describe that formation, please.

A. It was about three or four wide, and, of course, in front—the front men turned to the left when they came out, and the others in the church turned out and followed the others, went on up the sidewalk.

Q. What was your detail at that time?

A. I was making moving pictures at that time.

Q. Did you make moving pictures of this Defendant, and the group as they came out of the church?

A. I did, as they turned up the street.

Q. And did you observe this group as they proceeded east along 6th Avenue North?

A. Yes, sir.

Q. Did you—were they in formation?

A. Yes, sir, they were in formation.

Q. Did you take moving pictures of that?

A. Yes, sir.

Q. Did you take moving pictures continually from the time they left the church?

A. No, sir, I didn't take them continually. That would be impossible.

Q. But you took moving pictures periodically?

[fol. 51] A. Yes, sir.

Q. Now, have you observed those moving pictures that you took on that occasion?

A. Yes, sir.

Q. Did they fairly represent to the—do they truly represent the facts that you have testified to here?

A. Yes, sir.

Mr. Walker: Your Honor, we would like to show the movies to clarify the testimony that Mr. Jones has given, and if possible, I believe that it will be necessary to locate and to point on the film, rather than show some things that might be prejudicial to this Defendant, in that he might not have been in Birmingham when other parts of the film were taken, but we would like to show, if we could, the part of the film that Mr. Jones took on that occasion of that group of people

coming out of the church where the gentlemen of the jury can better understand the testimony that Mr. Jones has given.

The Court: Any objections?

Mr. Shores: Your Honor, we would like to object on the grounds he stated his movie wasn't continuous. From aught that appears, he might have just taken shots at certain points which would indicate some inconsistency with respect to the whole line of march and not the time he was out of the line. There has been testimony that he was in and out of the line, that he was at one part at one time, and another part at one time, and now if this film doesn't show all of that, we would object to it.

Mr. Walker: Judge Bailes, that very point was raised in a case and I am sorry, I brought the wrong notebook, and I don't have that citation, but I could readily obtain it but that very point has been raised and answered that it is not an excuse for admitting the film.

Mr. Shores: Your Honor, commonsense would appear in that a part of the testimony shows this man at one point and at one part of the line, and another part to the side of the line and another [fol. 52] time in the back or the front. If he has got a film that shows only the points where he was just walking alongside, which is to the benefit of the City, we certainly would say that would be prejudicial unless it shows the whole line of march from the time it left the church until it stopped. If we could view the film out of the sight of the jury and see what it shows before

Q. He was not there at that time?

A. No, sir.

Q. Do you know when he left this group?

A. Like I say, the last time I saw him was in the 600 Block and 17th Street, and then he went on with the [fol. 49] group and we cut them off and let them up to 5th Avenue, and then we put them in.

Q. Did you ever see him when he wasn't on the sidewalk?

A. No, other than crossing the street.

Mr. Shores: That is all.

Mr. Walker: No further questions.

The Court: That is all, you may step down. Who do you have next?

(Witness excused.)

Mr. Walker: Marcus A. Jones, Sr.

MARCUS A. JONES, SR., called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Walker:

Q. State your name, please.

A. Marcus A. Jones.

Q. And occupation?

A. Detective for the City of Birmingham.

Q. How long have you been employed by the City of Birmingham?

A. I have been with the City about 20 years, about 10 years as a detective.

they were permitted to see it, it is possible that we could agree to it.

The Court: Very well, take a little rest period and be at leisure until recalled.

(Whereupon, the jury was excused from the Courtroom at 10:20 A.M.; following which the following occurred:)

The Court: Is it agreeable for the counsel to go in where the machine is?

Mr. Walker: It would be all right.

Mr. Shores: Yes, sir.

(Whereupon, a recess was taken at 10:20 for a viewing of the film; following which the jury entered the box at 10:30; following which the following occurred:)

The Court: Counsel ready for the jury?

Mr. Shores: We are ready, Your Honor.

Mr. Walker: Yes, sir.

The Court: Let the record show that the City offers to present certain motion picture scenes and the stipulation is agreed by counsel on both sides. All right.

(Whereupon, a motion picture was shown; following which the following occurred:)

Mr. Walker: Would you cut it off?

Q. Now, Detective Jones, does the pictures that you have just shown to the jury, does that truly represent what you observed on April 12th, Good Friday?

A. Yes, sir.

Mr. Walker: That is all.

Cross Examination by Mr. Shores:

Q. Detective Jones, how long have you known Reverend [fol. 53] Shuttlesworth?

A. Six or seven years, I am not quite sure.

Q. And you know him on sight, do you not?

A. Yes, sir.

Q. And in making that film you were on the outside of the church when they came out?

A. Yes.

Q. And as they marched up the street, does the film show that they were marching in two's?

A. The way I took it they were marching in three's and four's and sometimes more.

Q. How many came out of the church? In your best judgment, who participated in this so-called march or parade?

A. I couldn't answer that question, because, in other words, as they came out and moved up the street, I moved up to a—in other words, when I left there they were still coming out of the church.

Q. And on each side, were there other groups coming out besides them?

A. As they marched up the street, as they came down the street, you had the people coming out of it, and as they came up the street there was certainly a lot of—a number of photographers following them and a lot of other people following them.

Q. Were you on the side of these people following them?

A. The Police tried to keep them in the middle of the street.

Q. Keep the people in the middle of the street?

A. That is right.

Q. The people were walking down the street?

A. Which group are you talking about?

Q. The group that came out of the church.

A. That is right.

Q. The group that was walking out of the sidewalk, I believe you didn't follow them from the time they left the church until they were arrested?

[fol. 54] A. I ran after them.

Q. You viewed the film that you made, didn't you?

A. That is right.

Q. How many times did you see Reverend Shuttlesworth?

A. I couldn't be sure, I think four times.

Q. What position was he to the group of marchers as they walked along the sidewalk?

A. I believe, in the best of my judgment, at first he was to the front to the right.

Q. And what did he do at that time?

A. The next time?

Q. The first time, what did he do the first time when they came out of the church?

A. I don't know, exactly.

Q. Did he head the line of marchers or did he shake hands and then step aside?

A. That I don't know.

Q. You didn't notice that in the film?

A. I noticed him in the front on the film.

Q. Did you notice whether he remained out in front of the marchers after he came out of the church?

A. No.

Q. The first—second time, where was he?

A. I believe the second time he was coming up from the line of marchers, coming up from the rear?

Q. Coming up from the rear?

A. Yes, sir.

Q. And he was not in front, he was coming up from the rear?

A. Yes.

Q. And what is the next time?

A. At that time he had reached the front.

Q. And at that time, was he talking to people?

A. I think he talked to people all the way up the line.

[fol. 55] Q. All the way up the line?

A. Yes, sir.

Q. You didn't hear what he was saying?

A. No.

Q. Did he talk any outside the line that you noticed?

A. I don't know whether he did or not. I want to think that he said something to one of the photographers. To the best of my judgment, he did.

Q. What were these people in the line of marchers doing?

A. You mean besides marching?

Q. Yes.

A. Some of them were singing.

Q. Was that the marchers or the people following the marchers singing?

A. That I couldn't answer, because I never was in the rear, I was always in the front.

Q. Were you present when the people who were walking along the street were stopped by the Officer between 17th and 18th Street on 5th Avenue?

A. At the time they were stopped, best of my judgment, I was to the side of them.

Q. How far were you from them?

A. Not over fifty feet, I know.

Q. Not over fifty feet? At that time did you see the Defendant?

A. No.

Q. I believe you made pictures of them being loaded into paddy wagons, didn't you?

A. Some of them, not all of them.

Q. Some of them? Did you see the Defendant arrested at that time?

A. No.

Q. In your best judgment, was he arrested at that time?

A. I know he wasn't arrested at that time.

[fol. 56] Q. You know he wasn't arrested at that time?

A. Yes, sir.

Q. And did they arrest all other the people who were in the line of marchers at that time?

A. I wouldn't think so. I wouldn't know. I wouldn't think they did.

Q. Did the Officers, when they stopped these people who were coming up the sidewalk in two's did they block off the line of marchers from the rest of the people at the time they were making the arrest?

A. Arthur, I don't understand what you mean.

Q. I mean as the marchers moved along 5th Avenue, between 17th and 18th Street, they were stopped about mid-way of the block. Now, in the rear was the crowd allowed to come on then, or did the Officers seal off 17th Street and 5th Avenue, have to seal it off?

A. They tried the best they could to seal it off, but it wasn't completely.

Q. How's that?

A. They weren't sealed off completely.

Q. What happened to these people who were sealed off at that time?

A. Do you mean—

Q. That is the marchers?

A. Those that were stopped, what they could they got in a group and marched them on out and put them in the wagons.

Q. Marched the group and put them in the wagons, and this Defendant was not in that group?

A. He was not in that group.

Q. Did you see people move out of the church prior to these so-called marchers coming out of the church?

A. I will answer you the best I can, knowing what your question was. I had been at the church some time, and I had definitely seen people go in and out, but not any group come out.

[fol. 57] Q. Did you take pictures of them too?

A. No.

Q. Had you made pictures previous to that of the people coming in and out of the church?

A. That particular day?

Q. Yes.

A. No.

Q. As a matter of fact, every time you saw somebody come out of the church you made pictures, did you not?

A. No.

Q. Did you make pictures of people at the time who were just walking up and down the street?

A. No.

Q. As a matter of fact, you walked along with one group that came through the park, and as they came

through the park you were making your movies and they came and went down by the Arrow-Smith building.

A. I think you got your information from your partner.

Q. How's that?

A. I think you got your information from your partner. That was another day.

Q. You made pictures—I saw it myself, that is a fact that you saw pictures that you made a picture of people walking through the park.

Mr. Walker: We object.

The Court: I didn't understand the question.

Mr. Shores: We withdraw it, Your Honor. That is all.

The Witness: Could I get this movie projector out of your way?

The Court: Just as you like.

Mr. Shores: Your Honor, we would like to put in evidence the portion of the film depicting the time they came out of the church, and until the time they were arrested.

Mr. Walker: The question is how I would have offered it in evidence myself, Judge Bailes. There is no way of preserving it and to use at the [fol. 58] subsequent trial to go to the Court of Appeals.

Mr. Shores: We can make a print of that section.

The Witness: Arthur, that is all made of the reversible type film, and I don't know if you could make a copy of it. It is all made of reversible and it is not made of the negative stock.

Mr. Shores: We would like to introduce it and he could take it to the Court of Appeals and show it.

The Court: I don't think I understand you.

Mr. Shores: What we would like to do is make this a part of the record, that part that is shown as to the various positions from the time he marked Good Friday, until the time they were arrested.

Mr. Walker: We submit that it is no more capable of that being made a part of the record than the view of the scene where a murder is being committed.

The Court: The Court understood it that a certain section of time, which was given in preview to counsel, should be given to the jury; nothing more and nothing less than this, and the Court thinks that was the stipulation. The Court thinks that was the agreement and that it is covered in the agreement.

Mr. Shores: Your Honor, the only point is, if it is given, it is a part of the record. It is in evidence and the only way the Appellate Court would see whether that is relevant evidence would be if it is a part of the evidence.

The Court: The fact that you counsel agreed to not put it in would relieve that issue.

Mr. Shores: And the statute provides how it would be taken care of in the event there was a review.

The Court: It was not within the stipulation that the film and so forth, would be made to take, physically, the film shown, and make it a part of the record of review for review.

[fol. 59] Mr. Billingsley: Your Honor, there is a method of taking blown up shots.

The Court: The motion is overruled.

Mr. Billingsley: We take exception.

(Whereupon, said film was marked "Defendant's Exhibit 1 for Identification", and the Court Reporter hereby certifies that the reproduction of such film is difficult or impracticable, which fact is hereby certified to the Clerk of the Court.)

Mr. Walker: That is all for the City.

COMPLAINANT RESTS.

Mr. Billingsley: If Your Honor please, we would like to offer a motion in the absence of the jury.

The Court: Very well, it will be necessary for you, please, to retire to the jury room.

(Whereupon, jury retired to the jury room at 10:45; following which the following occurred:)

Mr. Billingsley: If Your Honor please, we would like to offer a motion to exclude the testimony and for judgment for the Defendant on the following grounds: (1) That the City of Birmingham has not made a case against this Defendant. (2) All of the testimony and evidence given in this cause indicates that the Defendant, during the time and on the occasions in question, merely exercises rights and privileges given to him as a citizen of the State of Alabama and of the United States of America, and by the First and Fourteenth Amendments to the Constitution of the United States of America. (3) There has been absolutely no evidence introduced by the City of Birmingham, to support the complaint or warrant in this cause.

(4) All of the testimony and evidence offered by the City of Birmingham does not prove Defendant guilty of any criminal act or unlawful acts during the time in question.

As Your Honor noticed, the testimony in this case does not show that the Defendant was engaged in any violation of the law, as far as parading [fol. 60] is concerned. It further appears that the only thing that anyone was doing, as shown by the film, they were walking the streets of the City of Birmingham, and if it is unlawful to walk the streets of the City of Birmingham in groups, then it is unlawful to walk, for two people to walk the sidewalk.

A parade is very obvious to the Court. It consists of bands, of cars, and many other things, and generally, a parade takes place in the middle of the street.

Your Honor, has heard all the testimony presented by the City, and there is no need, under any circumstances, for the Defendant to take up the time of the Court in this matter, and we ask that the Court grant this motion and we also file this written motion for the record.

The Court: Let the motion be overruled.

Mr. Billingsley: We take exception.

Mr. Shores: Your Honor, before we begin putting on testimony, we would like to have two or three minutes recess to see what witness we are going to put on.

The Court: All right.

(Whereupon, proceedings were in recess from 10:55 A.M. until 11:12 A.M.; following which the following occurred:)

The Court: Counsel ready?

Mr. Shores: We are ready, Your Honor. Ask Mrs. Craig to come in.

EVIDENCE ON BEHALF OF THE RESPONDENT

ROSA LEE CRAIG, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Shores:

Q. State your name, please.

A. Mrs. Rosa Lee Craig.

[fol. 61] Q. Where do you live, Mrs. Craig?

A. 1820 Henrietta Drive.

Q. On or about April 12th, Good Friday, did you witness several persons walking from 6th Avenue and 13th Street to 5th Avenue and 17th and 18th Street?

A. Yes, I did.

Q. Where were you when these people first began this walking?

A. I left the church.

Q. You left the church? Were you in that group?

A. I was not.

Q. Did you notice them when they came out of the church?

A. Yes.

Q. How were they grouped?

A. In two's.

Q. In two's?

A. Yes.

Q. Did you see Reverend Shuttlesworth at any time during this, or at the beginning or during this march or walking?

A. Yes, I saw him.

Q. When did you first see him on that occasion?

A. When he left the church.

Q. When he left the church. Was he in line with this group of people that left this church?

A. No, he wasn't.

Q. What was his position? What position did he maintain to this group of people that marched from the church to 5th Avenue and 17th Street?

A. He was out with the rest of the crowd.

Q. Out with the rest of the crowd?

A. And walking.

Q. Did you observe him doing anything at any time as these people walked up the street?

A. He was telling the people to be quiet.

Q. He was telling the people to be quiet?

[fol. 62] Q. And be orderly?

A. Yes, sir.

Q. Did you walk beside this group as they walked up the street?

A. Yes, I did.

Q. What was this group of marchers doing?

A. They was walking along in two's.

Q. Just walking up the street?

A. Yes, sir.

Q. Now, in your best judgment, how many were there that left this church and walked in pairs up the street?

A. About 52.

Q. In your best judgment about 52, or more?

A. Yes, sir.

Q. Did you see the group when they were stopped?

A. Yes, I did.

Q. Was Reverend Shuttlesworth in the group at the time they were stopped? Did you see?

A. No, he wasn't in the group.

Q. Did you see him arrested at that time?

A. No, I did not.

Q. When did you last see him?

A. When I saw him he was just walking along with the crowd.

Q. Was he is the crowd when they were stopped, as you recall?

A. No.

Q. He was not in the crowd when they were stopped?

A. No.

Mr. Shores: I believe that is all. Answer Mr. Walker's questions.

Mr. Walker: No questions.

(Witness excused.)

Mr. Shores: That is all, you may come down. Call Mr. John D. Brown.

[fol. 63] JOHN D. BROWN, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Shores:

Q. Speak out so we can hear you. What is your full name?

A. John David Brown.

Q. Where do you live, Mr. Brown?

A. 3836—11th Avenue North.

Q. On or about April 12th, Good Friday, were you in that group of persons who left the church and walked up 6th Avenue to 17th Street and then finally to 5th Avenue, and were stopped by Officers?

A. Yes, I was.

Q. From what point did you leave, did you leave the church?

A. Yes.

Q. About how many of you were in this group that walked from the church to the point where you were arrested?

A. There were 52.

Q. Fifty-two?

A. Yes, sir.

Q. You were in the group when they left the church?

A. Yes.

Q. Will you describe the formation as they left this church? Were they in single file, in two's, or three's or four's?

A. We were in two's.

Q. You were in two's?

A. Yes.

Q. Did you observe Reverend Shuttlesworth at any time from the beginning of the line of march or walking until the time you were stopped?

A. Yes, I did.

[fol. 64] Q. Where did you first see him?

A. First I saw him at the church, and later as we were walking, he was at the side telling us to be orderly, in the front, and then he went to the back.

Q. In other words, he was not paired off with anybody, as you walked up the street?

A. No, he wasn't.

Q. Were you arrested that day?
A. Yes, I was.
Q. Was Reverend Shuttlesworth arrested at the time you were arrested?
A. No, he wasn't.

Mr. Shores: That is all.

Cross Examination by Mr. Walker:

Q. Do you know where the Defendant was at the time the group was arrested?
A. He wasn't up in the front, he was in the back.

Mr. Walker: No further questions.

(Witness excused.)

Mr. Shores: That is all. Call Mrs. Barbara Jean Breedlove.

BARBARA JEAN BREEDLOVE, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Shores:

Q. Speak up so that the jury and the lawyers can hear you. Would you state your full name?
A. Bobbie Jean Breedlove.
Q. Where do you live, Miss Breedlove?
A. 1609 Fourth Alley South.
Q. Were you in the group that was arrested for walking up the street on Good Friday?
A. Yes, sir.
[fol. 65] Q. And where did you start?
A. I started from the church; we left the church.

Q. About how many were in your group?

A. About 52.

Q. And how were you—what sort of formation were you in?

A. We was in two's.

Q. You were in two's?

A. Yes, sir.

Q. And did you remain in two's from the time that you left the church until the time you were stopped by the Officers?

A. Yes, we did.

Q. Did you see Reverend Shuttlesworth at that time?

A. I seen Reverend Shuttlesworth when I was coming out of the church and he was directing the crowd to keep orderly, and not have any violence, but he wasn't in the march.

Q. He was not paired off in the march?

A. No, he wasn't?

Q. At the time you were arrested, was he arrested at that time?

A. No, he wasn't.

Mr. Shores: That is all.

Cross Examination by Mr. Walker:

Q. Bobbie, actually, he was telling the marchers, wasn't he, to be orderly, rather than the crowd?

A. He was telling everyone that was marching from the church; I guess he was telling all of the people not to have any disorderly conduct. To me, that is the way it seemed.

Q. Specifically, he was telling the 52 of you to be orderly?

A. Yes, sir.

Q. In fact, he was between the sidewalk and the street, is that not correct?

A. Between—

Q. In other words, the 52 of you were walking down the sidewalk east?

[fol. 66] A. Yes, sir, we was.

Q. And he was between the sidewalk and the street, is that not correct?

A. Well, he was on the sideline. He wasn't marching, if that is what you are trying to find out.

Q. That is not my question. He was not next to the building side?

A. When I seen him he was coming out of the church. We was coming out of the church and marching, and he was to the side of us at the beginning, and he was telling us not to be disorderly and violent, and further on up I did not see Reverend Shuttlesworth.

Q. He was on your left side, is that not correct?

A. He was on the left side coming out of the church.

Q. Now, this group of spectators were lined on the right side, next to the building, is that not correct?

A. On the right side?

Q. Yes, on the right side next to the buildings?

A. I don't remember that.

Q. Well, they weren't out in the street were they?

A. They was people all the way around.

Mr. Walker: No further questions.

(Witness excused.)

Mr. Shores: That is all. Call Reverend Billups.

REVEREND CHARLES BILLUPS, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Shores:

Q. Reverend Billups, would you state your full name?

A. Charles Billups.

Q. And where do you live, Reverend Billups?

A. 3516 64th Place North.

Q. Were you present at the church, and did you observe [fol. 67] the persons walking from the church to the time they were arrested for marching or parading wtihout a permit?

A. Yes.

Q. Did you see Reverend Shuttlesworth on that day?

A. Yes, sir, I did.

Q. Were you in the group of persons that were walking or marching?

A. No.

Q. When did you first observe the group of marchers?

A. Well, I was inside the church.

Q. You were inside the church?

A. I walked out, I was right behind the group that was walking and I walked out behind the group.

Q. You walked out behind the marchers?

A. Yes, sir.

Q. Did you observe Reverend Shuttlesworth then, when he came out of the church?

A. Yes.

Q. What position, in respect to the group of people, was he?

A. At first when he came out of the church he shaked Reverend King's hand and then next they marched on in front of him. He stood on the side telling people to be

quiet, and we don't want any violence, don't keep up too much noise. He was moving his hands and then he started walking down beside of the ones that were walking down going east toward the City Hall.

Q. And how were they grouped, in one, or two's, three's, or four's, or in what sort of formation were these people that were marching?

A. In two's.

Q. In two's?

A. Yes, sir.

Q. Did you watch them from the time that they left the church, until they were arrested?

A. I watched from the time when they started and until [fol. 68] 17th Street, and we couldn't go on any further because it was blocked off after the marchers proceeded on down to the Courthouse.

Q. Did you notice whether or not Reverend Shuttlesworth ever got off the sidewalk to talk to anybody in the crowd?

A. He did. He talked to me for a while. He left the people who were walking and spoke to me.

Q. At any time was he a part of the marching group? In other words, was he paired off at that time with anyone?

A. No, he was not.

Q. Did you see the persons when they were stopped between 17th and 18th Street and 5th Avenue?

A. Yes, sir, I did.

Q. Did you see whether or not Reverend Shuttlesworth was arrested at that time?

A. He was not arrested at that time.

Q. He was not arrested at that time?

A. No, sir.

Q. Do you know whether or not that they arrested all the other people that were marching?

A. They did.

Mr. Shores: That is all.

Cross Examination by Mr. Walker:

Q. Reverend Billups, did you see Shuttlesworth at any time after the group turned south on 17th Street off of 6th Avenue?

A. As they turned South off 6th?

Q. Yes.

A. Yes, sir, I did.

Q. Isn't it a fact he ran through the park there?

A. No, he did not. At that time he was by my side. At the time they turned, the marchers, and we were standing there together.

Q. Isn't it a fact he didn't leave the group until after [fol. 69] the arrests started?

A. He left before the arrests.

Q. Before the arrests?

A. That is right.

Q. Where was he before he left?

A. He was in the park. He was in the park and he left the group when they turned. He left back there where they sealed off, where they sealed off the block.

Q. He left the block when he saw the block was sealed off?

A. He left when he saw the block sealed off, that is when he left.

Q. All right. Who was the leader of this formation?

A. Who was the leader?

Q. Who walked in front?

A. There was Reverend King and Reverend Abernathy.

Q. And which Reverend King is that?

A. Reverend Martin Luther King.

Q. And how was he dressed?

A. He was dressed in, I would say, bluejeans and gray shirt.

Q. And how was the Reverend Abernathy dressed?

A. He was dressed the same.

Q. And what about Shuttlesworth?

A. He was dressed the same, had on bluejeans.

Q. How were you dressed?

A. I had on a dungaree coat and full outfit of dungaree and overall.

Mr. Walker: That is all.

Mr. Shores: That is all.

The Court: Who do you have next?

(Witness excused.)

Mr. Shores: Reverend Shuttlesworth.

Reverend Fred L. Shuttlesworth, called as a witness, being first duly sworn, was examined and testified as follows:

[fol. 70] *Direct Examination by Mr. Shores:*

Q. Reverend, for the record, will you state your name?

A. Fred L. Shuttlesworth.

Q. Reverend Shuttlesworth, during April 12th, at which time a group of persons walked from 14th Street and 6th Avenue to approximately middleways of the block on

5th Avenue between 17th and 18th Street; were you present at any time during the time these people left until the time they were arrested?

A. I was present at different positions in the crowd, sometimes on the sidewalk—pardon my hoarseness.

Q. Will you describe your acts from the time this group left the church, until the time you left the group?

A. When Dr. King and Abernathy got to the front door, I shook hands with them and stepped aside, and they proceeded up the sidewalk, so to keep the people who were standing in the street and the sidewalk adjacent from gathering up with them. As such, I cautioned the crowd not to make any noise, and not to join them.

Q. And how were they grouped as they came out of the church?

A. By two's.

Q. By two's?

A. Yes, sir.

Q. And do you know the number of persons who took part in this walking up the street?

A. I didn't count them. They were more than fifty, I would say.

Q. What was the conduct of these people walking up the street?

A. Quite orderly, by two's.

Q. At any time did you join the group and were you paired off with any other persons who were walking up the street?

[fol. 71] A. No, in fact, all of the marchers, I would say, got out before—you see, I stood back to keep the crowd from them, and Abernathy and Dr. King's associate suggested that I come to the front of the crowd and speak with him for a minute or two, so I spoke with him and

stepped back off and about that time the Officers threatened to arrest anybody in the street where the 16th Street was, and so I stopped there and I cautioned the crowd to step back, and I was in the street at this time.

Q. And from time to time you moved away from the marchers?

A. Most of the time I was away from the marchers.

Q. And do you remember counseling them to be orderly and not to resort to any violence?

A. Particularly the group in Kelly Ingram Park. The park had quite a few people in it, so I was off of the sidewalk in the park counseling as best I could.

Q. At what point did you leave the group?

A. I never was with the group, as such. I never did go any further from 17th Street, and I was off the side with Billups and one or two more of them.

Q. And, in other words, after the officers sealed off the people who were grouped together, you were not in the group and didn't go any further, is that correct?

A. It wasn't my intention to march or go any further.

Q. You mean you didn't?

A. Try to go across the block, oh, no.

Q. You didn't go on the 17th Street side?

A. I don't recall going across.

Q. Were you arrested then, when the others were arrested?

Mr. Walker: We object to that when he was arrested.

The Court: Well, let him say.

Q. You were not arrested?

A. No.

Q. You were not with them and you were not arrested at that time?

[fol. 72] A. No.

Q. When were you arrested and charged with parading without a permit?

A. I would imagine it was about an hour or two later, maybe an hour. It might have been between an hour and forty-two minutes later, I was at the motel and two detectives came up and I knew them, and I came to the balcony, and they said to me we want to talk to you, and so I came down and they said you were parading without a permit, we came to get you. So they arrested me.

Q. They arrested you at the motel?

A. I had to go back in to get my coat, but they wanted me to go right then, but I wouldn't go until I got my coat.

Q. You got your coat and you went on at that time?

A. Yes.

Q. And it was then you were charged with parading without a permit?

A. Yes, sir.

Mr. Shores: I believe that is all.

Cross Examination by Mr. Walker:

Q. Reverend Shuttlesworth, how were you dressed on that morning or afternoon when you first went into the church?

A. What I had on when I came out.

Q. You did not change clothes inside the church?

A. Certainly not.

Q. How were you dressed when you came out?

A. As the film shows, blue shirt, and bluejeans, I think they call them.

Q. Was everybody in that group of 52 dressed that way?

A. They were not.

Q. Was Martin Luther King in that group?

A. Was he?

Q. Yes.

A. He was.

[fol. 73] A. He was dressed with bluejeans and shirt.

Q. Was Reverend Abernathy dressed that way too?

A. He was.

Q. Was anyone else dressed that way?

A. You mean in the marchers?

Q. In the marchers.

A. I think that one time, Bernard Lee, one of Mr. King's assistants, was. He was dressed in bluejeans. I was not paying particular attention, but most of the other people wore bluejeans.

Q. Was that supposed to symbolize anything? What was the meaning of those bluejeans.

Mr. Billingsley: We object to that. It is immaterial and irrelevant.

The Court: Overruled.

Mr. Billingsley: We except.

Q. What was the meaning of the bluejeans. Did the leaders wear bluejeans?

A. No. As a matter of fact, I think that sometime before we had a period of mourning, and many people, from time to time, had on bluejeans over a period of a month or more. It just so happened that they had them on that day.

Q. Coincidence?

A. You might call it that, if you like.

Mr. Walker: That is all.

Re-Direct Examination by Mr. Shores:

Q. In other words, you were not dressed for any parade, were you?

A. I had on bluejeans for other purposes.

Q. And there were several other persons who did not take part in that walking that day had on similar type dress?

A. Many people in the crowd had on bluejeans, as I think the film will show.

Mr. Shores: That is all.

Mr. Walker: No further questions.

[fol. 74] (Witness excused)

Mr. Shores: That is the Defendant's case, Your Honor.

Mr. Walker: We have rested.

The Foregoing Was All the Evidence in the Case.

Mr. Billingsley: Your Honor, at this time we would like to renew our motion to exclude the testimony and for judgment.

The Court: The Court renews its ruling.

Mr. Billingsley: All right, we take exception.

The Court: Counsel ready for the arguments?

Mr. Walker: Yes, sir.

Mr. Shores: Yes, sir.

The Court: Gentlemen, that is all the evidence in the case and we will now have the arguments by the attorneys.

(Whereupon, Mr. Walker addressed the jury on behalf of the Complainant in opening argument,

following by Mr. Arthur Shores, who addressed the jury on behalf of the Respondent, followed by Mr. Walker, who closed the argument for the Complainant, there being no objection and exceptions reserved to the arguments, the following occurred:)

The Court: Gentlemen, unless there is an objection on the part of counsel, it would be the Court's pleasure to declare an earlier recess for lunch period and reserve the charge until thereafter. Is that agreeable to both parties?

Mr. Walker: Yes, sir.

Mr. Shores: Yes, sir.

The Court: And, of course, that presupposes that the jury separates and goes to lunch at its own pleasure.

Mr. Shores: That is right, Judge.

Mr. Walker: Yes, sir.

The Court: Very well, under the agreement of counsel, be back at 1:30. Please remember what the law requires me to say about not mentioning the case to anybody, and I will see you at 1:30 P.M.

[fol. 75] (Whereupon, Court was in recess from 11:40 A.M. until 1:55 P.M.; following which the following occurred:)

ORAL CHARGE OF THE COURT

The Court: You have heard the testimony and the summation of counsel. It is the duty of the one sitting as umpire to give you, in charge, the salient points of law governing the case. They are simple and few.

First, the great basic bedrock rule is that any man charged with an offense can come into Court with pre-

sumption of innocence in his favor, which presumption of innocence goes with him until it is overcome by evidence.

The second one is that the burden of proof is always upon the prosecutor, never upon the Defendant.

The third ground rule is a little more difficult. It deals with the measure of proof there must be. The Supreme Court has addressed itself to that third ground, and the books are full of its observations on this third ground, and the best way the Supreme Court had been able to say it is this: You are talking about the measure of proof, how much proof there must be. Well, it starts out by saying the twelve men in the jury box are the twelve judges of the facts, and hearing the facts they shall evaluate the facts and then judge the facts. And to reach the measure of proof, if the jury, as judges of the facts, is convinced beyond a reasonable doubt and to a moral certainty that a defendant is guilty as charged, it is their duty to convict him. On the other hand, if the jury, sitting as the judges of the facts, they are not convinced beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged, it is the jury's duty to acquit him.

Those are the ground rules. Of course, there are some fringe rules. I don't know whether to take up your time or not. Justice Oliver Wendell Holmes has said this: It is the duty—now, the State of Alabama has never said this, but the Supreme Court has said this—It is the duty of a jury to observe the witness that takes the witness [fol. 76] stand, to observe the person, the glitter of his eye, the cut of his chin, the tone of his voice, his manner of walking to the stand and walking away, and his demeanor, and everything about him; and having considered everything about the man, or woman, that takes the wit-

ness stand, if a jury is convinced beyond a reasonable doubt and to a moral certainty that any witness has wilfully sworn falsely, then the jury may, at its discretion, disregard or leave out anything, and everything, such a witness has said; to reject that witness's testimony entirely.

Now, I have a request for a written charge and I believe there were no other written charges. Therefore, gentlemen, having heard the charge as contained in the complaint, you find the complaint and you will have it with you on your table, in your room, for deliberation about six lines, actually. The code of the City put the whole matter in this language—that I believe counsel read to you, a part of it at least—"It shall be unlawful to organize, or hold, or to assist in organizing or holding, or to take part or participate in any parade or procession or other public demonstration on the streets, or other public ways of the City, unless a permit therefor had been secured from the Commission," the city government. And the rest of it is descriptive of asking for and securing or not, such a permit.

Then the City comes and says: Fred L. Shuttlesworth, within twelve months of the beginning of the prosecution and within the City of Birmingham, or the police jurisdiction thereof did take part, or participate, in a parade or a procession on the streets of the City without having secured a permit, therefor, from the Commission, contrary to and in violation of Section 1159 of the general code of the City of Birmingham. And it all comes down to this: Did the Defendant take part in, or participate, in a parade or procession.

[fol. 77] And I come back to what I quoted you from the Supreme Courts' definition of the third great basic

rule of this trial and that is: Sitting as the Judges of the facts, to be authorized to render a verdict of guilty, you must be convinced beyond a reasonable doubt, and to a moral certainty, that the Defendant is guilty as charged inside the four corners of that complaint.

If after having heard all the testimony, you, sitting as the Judges of the facts, are not convinced beyond a reasonable doubt and to a moral certainty that that paper and complaint is true, it would be your duty to acquit him.

The penalty clauses, in the event of a finding of guilty, the Defendant's punishment runs from—

Mr. Walker: One penny to one hundred dollars.

The Court: One penny to one hundred dollars.

Any corrections?

Mr. Walker: No, sir.

Mr. Shores: We have none.

The Court: Therefore, gentlemen, please take with you the complaint and these forms of verdict typed just to save you from the tedium of writing them. Please take them and retire to the juryroom and let your first procedure be to elect one of you as your foreman. Thank you and you may take the case.

Mr. Shores: Your Honor, we would like to note an exception to the requested charge by the Defendant.

The Court: If it is marked refused, you automatically have it and it will have to go in the record.

Mr. Shores: Thank you, Your Honor.

END OF PROCEEDINGS

[fol. 80]

PROCEEDINGS IN THE COURT OF APPEALS OF ALABAMA, SIXTH DIVISION

IN THE COURT OF APPEALS OF ALABAMA

No. .....

FRED L. SHUTTLESWORTH,

Appellant,

vs.

CITY OF BIRMINGHAM,

Appellee.

Assignment of Errors

Now comes the Appellant, defendant in the cause below, and shows unto the Court that manifest error has been committed on the trial of this cause in the Court below, to the hurt and prejudice of this Appellant and as grounds of error, assigns the following, separately and severally:

1. The Court erred in overruling the defendant's demurrers filed in this cause (Tr. 3, 4, 5, 8 & 17), to which ruling the defendant duly excepted.

2. The Court erred in overruling the defendant's Motion to Quash Venire (Tr. 4, 5, 8 & 17), to which ruling the defendant duly excepted.

3. The Court erred in overruling defendant's Motion to Exclude the Testimony and for Judgment (Tr. 7, 8, 58, 59 & 73).

4. The Court erred in overruling defendant's Motion for New Trial (Tr. 8, 11 & 12).

Assignment of Errors

5. The Court erred in fixing the defendant's appeal bond in the sum of Twenty-five Hundred ($2500.00) Dollars (Tr. 10).

6. The Court erred in refusing the defendant's request Charge #1, as follows:

"If you believe the evidence in this case, then, Gentlemen of the Jury, you should find the defendant not guilty" (Tr. 13).

/s/ ARTHUR D. SHORES
/s/ ORZELL BILLINGSLEY, JR.
Attorneys for Appellant

I hereby certify that I have served a copy of the foregoing assignment of Errors to the Honorable William C. Walker, Attorney for the City of Birmingham, by United States mail, postage prepaid, this 18th day of December, 1963.

/s/ ARTHUR D. SHORES
Attorney for Appellant

[fol. 81]

Majority Opinion

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1965-66

6 Div. 979

FRED L. SHUTTLESWORTH,

v.

CITY OF BIRMINGHAM.

APPEAL FROM JEFFERSON CIRCUIT COURT

CATES, JUDGE

This appeal was submitted February 27, 1964, and was originally assigned to JOHNSON, J.

Shuttlesworth was convicted by a jury in a circuit court trial de novo. The City charged him with a breach [fol. 82] of its ordinance against parading without a permit. § 1159, General City Code of 1944.[1]

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[1] "It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

"To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, de-

Pursuant to verdict, the trial judge adjudicated him guilty, fined him $75.00 and costs, and also sentenced him to ninety days hard labor for the City.

There are three questions for decision: (1) whether § 1159, supra, denies, on its face, due process of law; (2) whether or not the ordinance as applied violates *Yick Wo* v. *Hopkins,* 118 U. S. 356; and (3) the sufficiency of the evidence.

I.

Facts

About two o'clock, P. M., Good Friday, April 12, 1963, some fifty-two persons issued from a church on Sixth Avenue, North, in Birmingham. They went easterly on the sidewalk of Sixth Avenue crossing Fifteenth and Sixteenth Streets. At Seventeenth Street they turned south, then at Fifth Avenue east again.

The defendant was one of the first to emerge from the church. Various city policemen saw him thereafter, [fol. 83] sometimes walking along with and sometimes alongside the others, once bounding from front to rear.

The group went along sometimes two, sometimes three, sometimes four, and at one time a witness saw one rank of six abreast. This observed bunching up coincided with the promenaders being blocked by officers parking police cars athwart the crossing at Fifth Avenue and Eighteenth Street.

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cency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

"The two preceding paragraphs, however, shall not apply to funeral processions."

There was no evidence that any of the group jaywalked, or that they got into the vehicular roadway except at designated cross walks. Nor did they obstruct cars or pedestrians nor disobey any traffic lights, or officers directing traffic. The only tendency toward showing disorderly conduct lay in evidence that some of the group sang and clapped hands.

The defense adduced no permit for a procession or parade nor was there evidence of anyone applying for a permit. Conversely, the City's proof showed no permit of record for the day in question.

II.

Background

A procession has been described as an *assembly in motion.* 72 C. J. S., p. 1204, states:

> "* * * a group, especially of persons or of vehicles containing persons, moving onward in an orderly, ceremonious, or solemn manner; an orderly file or formation, especially of marchers; a parade."

The essence seems to lie in the group's having ad hoc and pro tempore exclusive possession of all or part of a public way.

Early—probably when in the grip of his fondness for referring to the public as the "Mob"—Holmes, J., in *Commonwealth* v. *Davis,* 162 Mass. 510, 39 N. E. 113, spawned what Judge Conway of the New York Court of Appeals characterized as "the plenary power [of public [fol. 84] officers] over use of streets and parks." *P.* v. *Kunz,* 300 N. Y. 273, 90 N. E. 2d 455, at 462. Cf. *Kunz* v. *New York,* 340 U. S. 290.

However, though the *Davis* case was approved in the United States Supreme Court (167 U. S. 43), its assurance has been eroded by later First-Fourteenth Amendment cases beginning with *Hague* v. *Committee,* 307 U. S. 496.

Consequently in 1941, we find the court saying in *Commonwealth* v. *Anderson,* 308 Mass. 370, 32 N. E. 2d 684 (hn. 2), concerning an ordinance of Boston as applied to a Jehovah's Witness:

> "* * * there is no suggestion in the agreed facts that the defendant was obstructing traffic, causing danger, or annoying travellers in any way, or that the form of the placards or the writing upon them was indecent, libellous, likely to incite violence or otherwise objectionable. Nor do the terms of the ordinance itself limit its prohibition to instances where these or similar conditions exist. The particular case here presented is one of the unqualified interdiction of a wholly inoffensive display of placards on a public street unless the defendant should submit to the requirement that he first obtain a permit. Whatever result might be reached if the ordinance, by its wording, affected only carefully defined instances of conduct actually inimical to the public interest, or if the proof had disclosed such conduct, we must at least conclude that under decisions by which we are bound the application of this ordinance to this defendant in this instance violated his constitutional right to do what he did without a previous permit from anyone. * * *"

And in the same volume on consolidated appeal, *Commonwealth* v. *Pascone,* 308 Mass. 591, 33 N. E. 2d 522,

we find the same rule again applied with a precise distinction of ratio decidendi in affirming the second case.

Moreover, in express terms the Massachusetts court, in 1947, comes to grips with the *Davis* case, *supra, Commonwealth* v. *Gilfedder,* 321 Mass. 335, 73 N. E. 2d 241 (hn. 3). The opinion confesses puzzlement at how the Supreme Court could speak as it did to its judgment in *Hague* and yet not have overruled *Davis, supra.* The [fol. 85] *Gilfedder* opinion by the distinguished Justice (and later Chief Justice) Qua is worthy of close study as a persuasive and considered precedent as to the use of parks by the public.

Hague was decided in 1939. The history of Mayor Hague's resistance to union activity of virtually all sorts cannot be ignored. Nor can that factor be gainsaid in assessing the 5-2 division in the then membership of the court. The opening paragraph, 307 U. S., at 500, is:

> "The judgment of the court in this case is that the decree is modified and as modified affirmed. MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS took no part in the consideration or decision of the case. MR. JUSTICE ROBERTS has an opinion in which MR. JUSTICE BLACK concurs, and MR. JUSTICE STONE an opinion in which MR. JUSTICE REED concurs. The CHIEF JUSTICE concurs in an opinion. MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissent for reasons stated in opinions by them respectively."

Carefully analyzed it is obvious that only Mr. Justice Butler (in dissent) was expressly willing to stand by *Davis* v. *Massachusetts,* 167 U. S. 43.

Roberts, J.,[3] said of *Davis*[4] (515):

> "The ordinance there in question apparently had a different purpose from that of the one here challenged, for it was not directed solely at the exercise of the right of speech and assembly, but was addressed as well to other activities, not in the nature of civil rights, which doubtless might be regulated or prohibited as respects their enjoyment in parks. In the instant case the ordinance deals only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and is not a general measure to promote the public convenience in the use of the streets or parks."

[fol. 86] After pointing out that the Jersey City ordinance explicitly required permits *only for public parades or assemblies,* he made this oft quoted statement:

> "* * * Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use

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[3] The writer suspects that Mr. Justice Roberts in *Hague,* was chary of "re-examination of constitutional principles" and hence chose to follow the English practice of distinguishing a prior precedent into such narrow confines that its immurement is that of a tomb.

[4] The Boston ordinance banned (without a permit from the Mayor) firing cannons, or firearms, hawking goods, setting up shows, etc., as well as public addresses.

the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

"We think the court below was right in holding the ordinance quoted in Note 1 void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disburbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."

At this point we pick up the decisions which follow in the train of the *Hague* case. The early '40's saw the emergence of the Jehovah's Witnesses cases.[5]

In *Lovell* v. *Griffin,* 303 U. S. 444, the court had held void an ordinance prescribing a permit to distribute literature.

Then after *Hague,* in 1939, we find:

Schneider v. *State,* 308 U. S. 147 (1939);
Carlson v. *California,* 310 U. S. 106 (1940);

[5] See Harper, *Justice Rutledge and the Bright Constellation,* 46, et seq.

Jamison v. *Texas*, 318 U. S. 413 (1943);
[fol. 87] *Largent* v. *Texas*, 318 U. S. 418 (1943);
Jones v. *Opelika*, 319 U. S. 103 (1943);
Murdock v. *Pennsylvania*, 319 U. S. 105 (1943);
Saia v. *New York*, 334 U. S. 558 (1948);
Kunz v. *New York*, 340 U. S. 290 (1951);
Gelling v. *Texas*, 343 U. S. 960 (1952);
Fowler v. *Rhode Island*, 345 U. S. 67 (1953);
and
Staub v. *City of Baxley*, 355 U. S. 313 (1958).

Against this array, however, stands *Cox* v. *New Hampshire*, 312 U. S. 569, which, unlike the multi-opinion *Hague* decision, came from an unanimous court speaking through Hughes, C. J. This opinion relied heavily on the State Supreme Court's construction in the same case. *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508.

Here, for affirmance, the City of Birmingham claims that *Cox* is decisive. Concededly, there are many similarities between § 1159 of the Birmingham Code of 1944 and the New Hampshire statute there in question.

Corresponding is the broad sweep of licensing: Thus from *Cox*, we find: " * * * no parade or procession upon any public street or way * * * unless a special license therefor * * *." And of like tenor, § 1159 reads: " * * * unlawful to organize * * * any parade or procession or other public demonstration on the streets or other public ways * * * unless a permit * * *."

Administrative mechanics in each are similar. The New Hampshire Act made no exceptions other than to empower the city licensing committee or board to grant "revocable blanket licenses" to fraternal and other like organizations, to theatres and undertakers.

However, the New Hampshire enactment applied not only to parades and processions but also to performances or exhibits comprising theatrical or dramatic representations as well as any open air public meeting upon any ground abutting on a street or public way.

[fol. 88] Moreover, the New Hampshire court, *State* v. *Cox,* made no reference to any prior judicial or administrative interpretation of the statute. Whereupon, the court proceeded to fill in by implication a variety of requirements: (1) reasonableness; (2) uniformity of treatment of applications; and (3) freedom from improper or inappropriate considerations and from unfair discrimination.

It was undoubtedly this gloss of "a systematic consistent and just order of treatment" which facilitated affirmance in *Cox* v. *New Hampshire,* supra.

Since, however, the validity prima facie of § 1159 has not been before any appellate court[6] we find it necessary to examine the unfolding of cases since *Cox.* In *Primm* v. *City of Birmingham,* —— Ala. App. ——, 177 So. 2d 326, we found insufficient evidence.

In passing, we note that in *McMeans* v. *City of Fort Deposit* (Cr. 11, 759-N, U. S. C., M. D., Alabama, September 30, 1965), [Frank, M.] Johnson, J., held an identical ordinance of the City of Fort Deposit to be unconstitutional as applied to the facts.

Nevertheless there are at least two reasons which keep us from using the *McMeans* opinion as authoritative as to Shuttlesworth's appeal.

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[6] A three-judge court presided over by Rives, J., in *King* v. *City of Birmingham* (Civil Action 63-196, U. S. D. C., N. D., Alabama, August 12, 1963), dissolved itself without taking up the constitutionality of § 1159.

First, the facts there recited disclose no parade or procession but rather only peaceful picketing within the protection of *Thornhill* v. *Alabama,* 310 U. S. 88. *Hotel & Restaurant Emp.* v. *Greenwood,* 249 Ala. 265, 30 So. 2d 696 (hn. 21).

[fol. 89] *Second,* the opinion states that the City appeared but did not seek a remand to its Recorder's Court.

Third, we recognize that Judge [Frank M.] Johnson is under the review of, and to that extent is bound by, the decisions of the Fifth Circuit. Indeed, his opinion relies on *Rachel* v. *Georgia,* 342 F. 2d 336, and *Peacock* v. *City of Greenwood,* 347 F. 2d 679, to justify removal under 28 U. S. C. 1443.

We understand that *Rachel* is to be taken up for argument and submission by the Supreme Court of the United States[7] at the current 1965-66 Term, probably in contrast with the Third Circuit's denial of removal in *Anderson* v. *City of Chester, Pennsylvania,* 34 L. W. ——.

III.

First Amendment Freedoms

The last term of the Supreme Court effectively saw the Fourteenth Amendment incorporate—albeit hesistantly—the first eight amendments to the Federal Constitution as part of the due process laid upon the states. Cf. Black, J., dissenting in *Adamson* v. *California,* 332 U. S. 46, with the concurring opinions of Harlan and Goldberg, J. J., in *Pointer* v. *Texas,* 380 U. S. 400.

The First Amendment reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

[7] Sub nom. *Georgia* v. *Rachel* (No. 147, 1965-66 Term), —— U. S. ——, 34 L. Week 3101.

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[fol. 90] Cardozo, in *The Paradoxes of Legal Science*, at pages 94-96, says:

"'* * * That ill deserves the name of confinement which hedges us in only from bogs and precipices. So that however it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law; and is not, as we are told, "liberty for every man to do what he lists." For who could be free, when every other man's humour might domineer over him? But a liberty to dispose and order freely as he lists his person, actions, possessions, and his whole property within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.' Modern research in social science has amplified the thought of Locke, but without changing its essentials. [Citing *Treatises on Civil Government*, book 2, sec. 57.]

"'If liberty is a social conception,' says Hobhouse, 'there can be no liberty without social restraint. For any one person, indeed, there might be a maximum of liberty if all social restraints were removed. Where physical strength alone prevails the strongest man has unlimited liberty to do what he likes with the

weaker; but clearly the greater the freedom of the strong man, the less the freedom of the weaker. What we mean by liberty as a social conception is a right to be shared by all members of society, and very little consideration suffices to show that, in the absence of restraints enforced on or accepted by all members of a society, the liberty of some must involve the oppression of others. . . . Excess of liberty contradicts itself. In short there is no such thing; there is only liberty for one and restraint for another.'"

And at pages 97-99 he continues:

"Bills of rights give assurance to the individual of the preservation of his liberty. They do not define the liberty they promise. * * * Liberty became identified with the reign of law. 'Freedom of men under government,' says Locke, 'is to have a standing rule to live by, common to every one of that society and made by the legislative power erected in it.' The individual may not be singled out from among his fellows, and made the victim of the shafts of malice. Those who are put over him 'are to govern by promulgated established law, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.'

[fol. 91] "Up to this, there is no restraint upon the scope or force of law so long as it be law, i. e., so long as it be general or equal, a rule as contrasted with an 'extemporary decree.' Liberty means more than this, however, as a concept of social science. It has come to mean more, at least in our own system, as a concept of constitutional law. The concept

in our constitutional development has undergone a steady and highly significant development. The individual may not only insist that the law which limits him in his activities shall impose like limits upon others in like circumstances. He will also be heard to say that there is a domain of free activity that may not be touched by government or law at all, whether the command be special against him or general against him and others. By express provision of the constitution, he is assured freedom of speech and freedom of conscience or religion. These latter immunities have thus the sanctions of a specific pledge, but they are merely phases of a larger immunity which finds expression in the comprehensive declaration that no one shall be deprived of liberty without due process of law. Such at least appears to be the more recent doctrine of the court that speaks the final word. Apart from any enumerated phase of liberty and beyond it, this declaration gives immunity against 'the play and action of purely personal and arbitrary power.' What is personal and arbitrary in mandate and restraint does not gain rationality and coherence because it takes the form of statute. The legislature does not speak with finality as to the measure of its own powers. The final word is for the courts."

Holmes, J., dissenting in *Abrams* v. *United States*, 250 U. S. 616, said:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes

in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should [fol. 92] be externally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. * * * "

From *Poulos* v. *State of New Hampshire,* 345 U. S. 395, per Reed, J., we quote:

"The principles of the First Amendmnt are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion

or instruction. It is a nonsequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary. It has indicated approval of reasonable non-discriminatory regulation by governmental authority that preserves peace, order and tranquillity without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion. When considering specifically the regulation of the use of public parks, this Court has taken the same position. See the quotation from the Hague case below and Kunz v. People of State of New York, 340 U. S. 290, 293-294; Saia v. People of State of New York, 334 U. S. 558, 562. In these cases, the ordinances were held invalid, not because they regulated the use of the parks for meeting and instruction but because they left complete discretion to refuse the use in the hands of officials. 'The right to be heard is placed in the uncontrolled discretion of the Chief of Police.' 334 U. S. at page 560, * * *' [W]e have consistently condemned licensing systems which vest in an administrative officials discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. 340 U. S. at page 294, * * *

"There is no basis for saying that freedom and order are not compatible. That would be a decision of desparation. Regulation and suppression are not the same, either in purpose or result, and courts of justice can tell the difference. * * *"

In *Herndon* v. *Lowry,* 301 U. S. 242,[8] and *Freedman* v. *Maryland,* 380 U. S. 51, the court refers in effect to the [fol. 93] preferred position of First Amendment rights of freedom of expression. *Thomas* v. *Collins,* 323 U. S. 516. This priority is also used in *Hague* v. *Committee,* supra. *Edwards* v. *South Carolina,* 372 U. S. 229, and *Cox* v. *Louisiana,* 379 U. S. 536, are recent examples of this formulation.

In our constitutional law freedom of expression can rarely be fettered by a prior restraint on its exercise. Blackstone, Comm. iv., 151, et seq., aptly said:

> "* * * The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraint upon publications, and not in freedom from censure for criminal matter when published. * * *"

Moreover, abuse of free speech is tolerated more: the stifling is a worse mischief. *Freedman* v. *Maryland,* supra.

Whether we concede that the appellant did or did not participate in a "procession" or "parade," undisputedly he was arrested while walking on a sidewalk. Immediately beforehand he had participated, from aught that appears, in an orderly and presumably lawful assembly.

By merely forbidding citizens to go to (or from) the place of assembly, the right of peaceable assembly could

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[8] "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the Legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. * * *"

easily be thwarted. Again we note Blackstone, Comm. i, 134:

> "* * * This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. * * *"

Also, the constitutional protection from unreasonable seizures applies to a seizing of the person. *Ex parte Burford,* 3 Cranch 448 (1806).

Hence, we consider ourselves bound to examine § 1159, supra, giving preference (1) to the constitutional rights [fol. 94] of free expression (e. g., free speech, publication) and of free assembly; and (2) to the implicit right to use the sidewalks for walking.

It is the recognition and regulation of this latter right as being nonexclusive which causes difficulty in legislating and in judicial review of the legislator's choice. This enters into two enquiries: the exent of the power available to regulate and the mode of its exercise.

IV.

Police Power

Code 1940, T. 62, § 654, relating solely to Birmingham, provides:

> "§ 654. The city shall have full, complete, unlimited, and continuous power and authority, from time to time, to adopt ordinances and regulations not inconsistent with the laws of the state and the federal and state Constitutions to carry into effect or dis-

charge the powers and duties conferred by law upon the city, and to provide for the safety, preserve the health, promote the prosperity, improve the morals, orders, comfort, and convenience of the inhabitants of the city, and to prevent and punish injuries and offenses to the public therein, and to prevent conflict and ill feeling between the races in the city by making provisions for the use of separate blocks or parts of blocks for residences, places of abode, and places of assembly by the different races,[9] and to prevent evasions and punish violations of the ordinances and resolutions of the city, and to compel obedience thereto by fine not exceeding one hundred dollars and by imprisonment or hard labor not exceeding six months, one or both, and by revocation of license granted by such municipality upon conviction in the recorder's court for violation of any of said ordinances; provided, however, that this section shall not be construed to authorize the forfeiture of franchises granted by state laws or city ordinances without appropriate legal proceedings; and to the [fol. 95] ends set out in this section the full, complete, and unlimited police powers possessed by the state of Alabama shall be had as though specifically and in detail set out in this section, in so far as it is possible for the legislature of Alabama under the Constitution of Alabama and of the United States to delegate such powers, it being expressly declared

[9] *City of B'ham.* v. *Monk*, 185 F. 2d 859 (B'ham. zoning ordinance); *Buchanan* v. *Warley*, 245 U. S. 60 (1917) (Louisville, Ky., ordinance); *Harmon* v. *Tyler*, 273 U. S. 608 (1927) (New Orleans ordinance); *City of Richmond* v. *Deans*, 281 U. S. 704 (1930) Richmond, Va., ordinance). See also *Robinson* v. *Florida*, 375 U. S. 918.

that nothing contained herein shall be construed as a limitation of or restriction on the police powers granted to the city under general or special laws."

The general municipal law, Code 1940, T. 37, § 455, reads:

"§ 455. Municipal corporations may, from time to time, adopt ordinances and resolutions not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred by this title, and provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and enforce obedience to such ordinances by fine not exceeding one hundred dollars, and by imprisonment or hard labor not exceeding six months, one or both."

Police power, 16 Am. Jur. 2d, Constitutional Law, § 262, is described (in part) thus:

"While it is generally recognized that it is very difficult and practically impossible to give an exact definition of the police power, many attempts have been made. There is no consensus in favor of any of them, but those definitions are of considerable value as indicating the breadth and scope of this power.

"The expression 'police power,' although capable of use, and sometimes used, in a restricted sense, is frequently used very broadly to include all legislation and almost every function of civil government. Thus, it has been stated that the police power in effect sums up the whole power of government, and

that all other powers are only incidental and ancillary to the execution of the police power; it is that full, final power involved in the administration of law as the means to the attainment of practical justice. And it has been said that the power is only another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state, that it is the vast residual power of the state, and that it comprises that portion of the sovereignty of the state which is not surrendered by the terms of the Federal Constitution to the federal government.

"Blackstone defines police power as 'the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, [fol. 96] and inoffensive in their respective stations. Many cases, employing the language of Chief Justice Shaw, define it as 'the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.'"

Knight, J., in *State* v. *Kartus,* 230 Ala. 352, 162 So. 533, said:

"No one, at this time, we take it, would have the temerity to undertake to define the 'police power' of a state, or mark its limitations. * * *"

has been here vested and, of necessity, this Court must declare the 'Permit Ordinance' unconstitutional."

Cox v. *Louisiana,* supra:

"This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. See *Saia* v. *New York,* supra, at 562. Also inherent in such a system allowing parades or meetings only with the prior permission of an official is the obvious danger to the right of a person or group not to be denied equal protection of the laws. See *Niemotko* v. *Maryland,* supra, at 272, 284; cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356. It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

"It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each appli-

In *Hawkins* v. *City of Birmingham*, 248 Ala. 692, 29 So. 2d 281, Foster, J., said of T. 62, § 654, supra (at p. 696): "This power is of course subject to be controlled." See also *City of Birmingham* v. *Birmingham Business College, Inc.*, 256 Ala. 551, 56 So. 2d 111.

Concededly, if the Legislature confers the charter power, a city or town may ordain regulations for the use of its streets and sidewalks. This power cannot, however, extend beyond constitutional bounds.

We are presented with two conflicting concepts. *First*, the use of public ways is subject primarily to going to and fro of the public generally, afoot on sidewalks, with the roadway mainly reserved for wheeled traffic.[10]

Secondly, free speech, the communication of ideas, and free assembly, locomotion, inhere in the use of public places.

[fol. 97] At the outset, we believe that the early case of *Commonwealth* v. *Davis*, supra, treating public property as subject to power to be used exclusively in the will of public authorities as if they were private owners is no longer valid. *Thomas* v. *Casey*, 121 N. J. L. 185, 1 A. 2d 866, rested on *Davis*. *Hague* v. *Committee*, supra, disapproved.

Police power[11] has been held vital for society to hold together: the contrast often is given of anarchy, and

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[10] "Any person engaged in a lawful pursuit has the right to pass on the public streets without interference, threats or intimidation." *Russell* v. *International Union*, 258 Ala. 615, 64 So. 2d 384. Nor is a pedestrian vis a vis a street railway running at grade to be deemed a trespasser. *Birmingham, Ensley, etc., R. R. Co.* v. *Stagg*, 196 Ala. 612, 72 So. 164.

[11] *Jacobson* v. *Massachusetts*, 197 U. S. 11 (smallpox vaccination); *Lieberman* v. *Van de Carr*, 199 U. S. 552 (milk delivery permit).

not the philosophic nirvana-like anarchy. Law and order for the protection of the weak from the strong is in contrast to the law of the jungle.

Emergencies, however, do not create powers: rather they furnish the occasion for the exercise of those conferred. Constitutional law cannot raise itself by its own bootstraps. *Homebuilding & Loan Assoc.* v. *Blaisdell,* 290 U. S. 398.

We do not doubt that § 654 of T. 62 and § 455 of T. 37, supra, confer on the city the power to regulate the use of public streets and places in the interest of accommodating conflicting claims of vehicles and pedestrians. Yet, in so resolving traffic problems the State and Federal Constitutions impose a duty to recognize liberty within a concept of an ordered society.

Basically, we consider that a municipality or a state legislature can require that a permit be first obtained to use the vehicular portion of a street for a parade or procession. Moreover, if the movement overflows onto the pedestrian sidewalk the same ends for control would seem to obtain.

[fol. 98] As to a group walking on the sidewalk of a dedicated street, spaced apart, not blocking others from going to or fro, nor interfering with cross traffic (either pedestrian or vehicular) and demeaning themselves in an orderly and peaceable fashion, we consider there is such a fundamental right to so use the sidewalk that a permit would be the exception. Thus, the City in such a case would have the burden of proving (beyond a reasonable doubt) that (1) no permit was issued and that (2) an abridgement of the rights (either of expression or of locomotion) is warranted by overriding considerations.

Picketing, as currently regulated by spacing the picketers

(both as to fore and aft and abreast), keeping them circulating and yielding the right of way to passers-by, affords a useful illustration.

Ordinarily, a court in reviewing legislation will look at the remedy with the favoring intendment that all rationally connected mischiefs passed through the collective mind of the lawmakers. Thus the inhibition of conduct—though sometimes partly innocent—can find support in the state's police power if aimed at a substantial evil.

Nevertheless, this balancing in First Amendment cases finds the scales weighted in the beginning in favor of the freedom which is sought to be restrained. As Rutledge, J., said in *Thomas* v. *Collins,* supra, at 529-530:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Prince* v. *Massachusetts,* [fol. 99] 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152-153.
>
> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threat-

ened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *De Jonge* v. *Oregon,* 299 U. S. 353, 364, and therefore are united in the First Article's assurance. * * * "

We conclude that the reference in § 1159 to the factors ("public welfare, peace, safety, health, decency, good order, morals or convenience") are but facets of the police power conferred on the City to enable it to establish and maintain itself as a viable entity. These elements are only the source to which the City may look in choosing the means toward a legitimate end. Police power is not an ever ready dues ex machina.

The enquiry next devolves on whether the City's legislative body has established an appropriate means to prevent abuses in the streets.
[fol. 100]

V.

Does § 1159 Impose An Invidious Prior Restraint?

This question we must answer in the affirmative.

In *Saia* v. *New York,* 334 U. S. 558, the court declared a sound truck permit ordinance void on its face.

Niemotko v. *Maryland,* 340 U. S. 268:

> "This Court has many times examined the licensing systems by which local bodies regulate the use of their parks and public places. * * * In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, *and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid.* * * *" (Italics added.)

Kunz v. *New York,* 340 U. S. 290:

> "* * * We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights.

"In considering the right of a municipality to control the use of public streets for the expression of religious views, we start with the words of Mr. Justice Roberts that 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' *Hague v. C. I. O.*, 307 U. S. 496, 515 (1939). Although this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, *Cox* v. *New Hampshire,* 312 U. S. 569 (1941), we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. * * *"

American Civil Liberties Union v. *Town of Cortlandt,* 109 N. Y. S. 2d 165:

"Although in most cases where legislative acts have been struck down, the discretion in administering the [101] licensing power has been placed in administrative official, the rule is no different where the legislative body reserves for itself the administration of the licensing power. In the case of Niemotko v. Maryland, 340 U. S. 268, * * * applications for a license were customarily made first to the Police Commissioner, and, if refused by him, application was then made to the City Council. Even that body was not permitted to have unlimited and uncircumscribed discretion. It is that type of discretion that

cation, free from improper or inappropriate considerations and from unfair discrimination" . . . [and with] a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways . . ."' *Cox* v. *New Hampshire,* supra, at 576. See *Poulos* v. *New Hampshire,* supra.

"But here it is clear that the practice in Baton Rouge allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings is an unwarranted abridgment of appellant's freedom of speech and assembly secured to him by the First Amendment, as applied to the States by the Fourteenth Amendment. It [fol. 102] follows, therefore, that appellant's conviction for violating the statute as so applied and enforced must be reversed."

The only administrative standards are those of the City's basic power virtually in its entirety. The expressions used are couched in the distributive. Hence, a single reference to the Commission's opinion of the public welfare, or of peace, or of safety, or of health, or of decency, or of good order, or of morals, or of convenience would suffice for a permit refusal.

"• • • [The police power of a state] must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."—*Treigle* v. *Acme Homestead Ass'n.,* 297 U. S. 189.

VI

§ 1159 Lacks Ascertainable Standards

If the cohesiveness of the fifty-two pedestrians in having a common starting point and apparent common destination were held to constitute a procession, nevertheless we should be constrained to hold the foregoing ordinance invalid for the lack of ascertainable constitutional standards in determining administratively when a permit shall be granted. *Baines* v. *City of Danville,* 337 F. 2d 579.

So far as we can find, § 1159 has been reviewed directly only once by appellate courts. In *Primm* v. *City of Birmingham,* supra, we held the City had singled out the defendant without showing any nexus between him and any other pedestrians. There, Johnson, J., said:

> "To hold that the acts of * * * Primm were violative of the above parading ordinance would, in effect, require a parading permit to be procured by every conventioneer wearing a large political button attempting to cross a street, or by every sporting enthusiast waving a pennant that denotes his loyalties while proceeding to the field of encounter. * * *"

In *Baines* v. *City of Danville,* supra, approving reference is made to the Model Ordinance Regulating Parades drafted by the National Institute of Municipal Law Officers.

[fol. 103] Hence, we have set out in parallel columns an analysis of the salient features of § 1159 and the Nimlo Model:

Birmingham 1944 Code, § 1159, 2d Par., supra.	Nimlo Model
I. Form of Application	I. (§ 10-304)
A. Written	A. On forms provided by Chief of Police
B. Information	B. Information
1. No. of persons, vehicles and animals.	"(a) The name, address and telephone number of the person seeking to conduct such parade;
2. Purpose.	"(b) If the parade is proposed to be conducted for, on behalf of, or by an organization, the name, address and telephone number of the headquarters of the organization, and of the authorized and responsible heads of such organization;
3. Route (or place of demonstration).	"(c) The name, address and telephone number of the person who will be the parade chairman and who will be responsible for its conduct;
4. Time not required to be given.	

"(d) The date when the parade is to be conducted;

"(e) The route to be traveled, the starting point and the termination point;

"(f) The approximate number of persons who, and animals and vehicles which, will constitute such parade; the type of animals, and description of the vehicles;

"(g) The hours when such parade will start and terminate;

"(h) A statement as to whether the parade will occupy all or only a portion of the width of the streets proposed to be traversed;

"(i) The location by streets of any assembly areas for such parade;

"(j) The time at which units of the parade will begin to assemble

at any such assembly area or areas;

"(k) The interval of space to be maintained between units of such parade;

"(l) If the parade is designed to be held by, and on behalf of or for, any person other than the applicant, the applicant for such permit shall file with the Chief of Police a communication in writing from the person proposing to hold the parade, authorizing the applicant to apply for the permit on his behalf;

[fol. 104]

"(m) Any additional information which the Chief of Police shall find reasonably necessary to a fair determination as to whether a permit should issue.

C. Late application: _____ days before proposed parade.

D. Fee: $.....

II. Exceptions

A. Funeral processions only exception.

II. Exceptions (§ 10-303)

A. Funeral processions.

B. Students going to and from classes, etc.

C. A governmental agency acting within scope.

III. Standards for Issuance

A. "The commission shall grant * * * and prescribing the the streets[12] * * * unless in its judgment:" the permit should be refused because of any one or more of the following:

1. Public welfare;
2. [Public] peace;
3. [Public] safety;
4. [Public] health;

III. Standards (§ 10-305)

"SECTION 10-305. *Standards for Issuance.* The Chief of Police shall issue a permit as provided for hereunder when, from a consideration of the application and from such other information as may otherwise be obtained, he finds that:

"(1) The conduct of the parade will not substantially interrupt the safe and orderly movement of other traffic contiguous to its route;

[12] § 10-308 of NIMLO Model empowers the Chief of Police to issue an alternate permit, i. e., for a different time or route from that proposed.

5. [Public] decency;
6. [Public] good order;
7. [Public] morals; or
8. [Public] convenience.

"(2) The conduct of the parade will not require the diversion of so great a number of police officers of the City to properly police the line of movement and the areas contiguous thereto as to prevent normal police protection to the City;

"(3) The conduct of such parade will not require the diversion of so great a number of ambulances as to prevent normal ambulance service to portions of the City other than that to be occupied by the proposed line of march and areas contiguous thereto;

"(4) The concentration of persons, animals and vehicles at assembly points of the parade will not unduly interfere with proper fire and police protection of, or ambulance

service to, areas contiguous to such assembly areas;

[fol. 105]

"(5) the conduct of such parade will not interfere with the movement of fire-fighting equipment enroute to a fire;

"(6) The conduct of parade is not reasonably likely to cause injury to persons or property, to provoke disorderly conduct or create a disturbance;

"(7) The parade is scheduled to move from its point of origin to its point of termination expeditiously and without unreasonable delays enroute;

"(8) The parade is not to be held for the sole purpose of advertising any product, goods or event, and is not designed to be held purely for private profit."

IV. Appeal Procedure:	IV. Appeal Procedure: (§ 10-307
None, except to courts, presumably by way of mandamus with alternative prayer for certiorari.	"SECTION 10-307. Appeal Procedure. Any person aggrieved shall have the right to appeal the denial of a parade permit to the City Council. The appeal shall be taken within ..... days after notice. The City Council shall act upon the appeal within ..... days after its receipt."

A keystone illustration of the canon of strict (or at least literal) construction of a penal law is found in *McBoyle* v. *United States,* 283 U. S. 25, at 27. There the government tried to apply the Dyer Act to punish theft of an airplane. Holmes, J., concluded:

> "'Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a simi-

lar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used. *United States* v. *Thind*, 261 U. S. 204, 209."

[fol. 106] And from a Massachusetts case we quote:

"* * * Prima facie, mere sauntering or loitering on a public way is lawful and the right of any man, woman, or child. This the Commonwealth concedes. Under the ordinance, such conduct continues conditionally lawful subject to a direction to move on by a police officer followed by unreasonable failure to comply and the expiration of seven minutes. Not all idling is prohibited, but only that which is unreasonable. The vice of the ordinance lies in its failure to prescribe any standard capable of intelligent human evaluation to enable one chargeable with its violation to discover those conditions which convert conduct which is prima facie lawful into that which is criminal. A 'statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' Connally v. General Construction Co., 269 U. S. 385, 391. * * *"—*Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N. E. 2d 666.

Connally v. *General Const. Co.*, 269 U. S. 385, is probably the most frequently cited case in this area:

"* * * The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial defini-

tion, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal."

In *United States* v. *Cardiff*, 344 U. S. 174, Douglas, J., said:

"All that the Department says may be true. But it does not enable us to make sense out of the statute. Nowhere does the Act say that a factory manager must allow entry and inspection at a reasonable hour. Section 704 makes entry and inspection conditioned on 'making request and obtaining permission'. It is that entry and inspection which § 301 (f) backs with a sanction. It would seem therefore on the face of the statute that the Act prohibits the refusal to permit inspection only if permission has been previously granted. Under that view the Act makes illegal the revocation of permission once given, not the failure to give permission. But that view would breed a host of problems. Would revocation of permission once given carry the criminal penalty no matter how long ago it was granted and no matter if it had no relation to the inspection demanded? Or must the per- [fol. 107] mission granted and revoked relate to the demand for inspection on which the prosecution is based? Those uncertainties make that construction pregnant with danger for the regulated business. The alternative construction pressed on us is equally treacherous because it gives conflicting commands. It makes inspection dependent on consent and makes re-

fusal to allow inspection a crime. However we read § 301 (f) we think it is not fair warning (cf. *United States* v. *Weitzel,* 246 U. S. 533, *McBoyle* v. *United States,* 283 U. S. 25) to the factory manager that if he fails to give consent, he is a criminal. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. *Herndon* v. *Lowry,* 301 U. S. 242."

This general rule of strict construction of penal laws began early in our courts, both state and Federal. Thus, Washington, J., in *United States* v. *Sharp* (1815), Pet. C. C. 118, at 122, said:

"* * * Laws which create crimes ought to be so explicit in themselves or by reference to some other standard, that all men subject to their penalties may know what acts it is their duty to avoid. * * *"

See also *United States* v. *Lacher,* 134 U. S. 624; *United States* v. *Brewer,* 139 U. S. 278; cf. *Nash* v. *United States,* 229 U. S. 373—"restraint of trade" has an ascertainable common law meaning. *Eubank* v. *Richmond,* 226 U. S. 137; *Panhandle Co.* v. *Highway Comm.,* 294 U. S. 613.

By 1914 we find the court subsuming the rule into its concept of due process and under the Fourteenth Amend-

ment rather than the Sixth. *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, struck down a state anti-trust law which used "real value." Cf. Kentucky Constitution 1891, § 198.

[fol. 108] In *Winters* v. *New York,* 333 U. S. 507, Reed, J., said:

> "* * * The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' *Cantwell* v. *Connecticut,* 310 U. S. 296; *Pierce* v. *United States,* 314 U. S. 306, 311. * * *
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> * * * * * *
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> "The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court. The legislative bodies in draftsmanship obviously have the same difficulty as do the judicial in interpretation. * * *
>
> "* * * But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the statute to collections of stores 'so massed as to become vehicles for inciting violent and depraved crimes against the person * * * not necessarily * * * sexual passion,' we find the specifications of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner.

Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required—no indecency or obscenity in any sense heretofore known to the law. 'So massed as to incite to crime' can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crime of violence against the person. No conspiracy to commit a crime is required. See *Musser* v. *Utah*, 333 U. S. 95. It is not an effective notice of new crime. The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears. • • •

• • • • •

[fol. 109] "• • • Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Herndon* v. *Lowry*, 301 U. S. 242, 259."

In the "Miracle" censorship case, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, the word "sacrilegious" (contrasted with "blashphemous") was held to be fatally vague. Clark, J., there said:

"* * * That statute makes it unlawful 'to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel [with specified exceptions not relevant here], unless there is at the time in full force and effect a valid license or permit therefor of the education department . . .' The statute further provides:

"'The director of the [motion picture] division [of the education department] or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. * * *

* * * * *

"* * * Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the 'sacrilegious' test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the

expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

"Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us. We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.'"

[fol. 110] Reference may also be had to the following articles: Amsterdam, *The Void-for-Vagueness Doctrine,* 109 U. Pa. L. Rev. 67; Aigler, *Legislation in Vague or General Terms,* 21 Mich. L. Rev. 831; Freund, *Use of Indefinite Terms in Statutes,* 30 Yale L. J. 437; Hall, *Strict or Liberal Construction of Penal Statutes,* 48 H. L. Rev. 748; Hall and Seligman, *Mistake of Law and Mens Rea,* 8 U. Chi. L. Rev. 641; Note, *Statutory Standards of Personal Conduct: Indefiniteness and Uncertainty as Violations of Due Process,* 38 H. L. Rev. 963; Note, *Indefinite Criteria of Definiteness in Statutes,* 45 H. L. Rev. 160; Note, *Void for Vagueness: An Escape from Statutory Interpretation,* 23 Ind. L. J. 272; Horack, *Constitutional Liberties and Statutory Construction,* 29 Iowa L. Rev. 448; Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law,* 3 Vand. L. Rev. 531; Morris, Case Note, 26 Tex. L. Rev. 216 and Case Note, 33 Va. L. Rev. 203.

Nor is this principle a stranger to our jurisprudence. *Carter,* 243 Ala. 575, 11 So. 2d 764; *Kahalley,* 254 Ala. 482, 48 So. 2d 794.

Mr. Justice Simpson well stated the rule in *Bolin,* 266 Ala. 256, 96 So. 2d 582, where the court on certified question held the stink bomb law void for vagueness. There we find:

> "If the provision can be sustained as constitutional, it must be under the police power of the state which authorizes the imposition of reasonable regulations in the interest of public health, public morals, public safety or the general welfare. Looking to one of the earliest authorities, Blackstone defines this power to be 'the due regulation and domestic order of the kingdom: whereby the individuals of the State, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious and inoffensive in their respective stations.' 4 Blackstone Commentaries 162.
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> "Mr. Justice Holmes, speaking for the Supreme Court of the United States in Noble State Bank v. Haskell, 219 U. S. 104, 111, observed:
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> [fol. 111] " 'It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518, 17 S. Ct. 864, 42 L. Ed. 260. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.'
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> * * * * *

"It is also settled law that 'In enacting a criminal statute, there is an obligation on the State to so frame it that those who are to administer it and those to whom it is to be administered may know what standard of conduct is intended to be required and legislation may run afoul of the due process clause because of a failure to set up any sufficient guidance to those who would be law-abiding, or to advise a defendant of the nature and cause of an accusation he is called on to answer, or to guide the courts in the law's enforcement.' Kahalley v. State, 254 Ala. 482, 483, 48 So. 2d 794, 795; Seals v. State, 239 Ala. 5, 194 So. 682; Standard Oil Co. v. State, 178 Ala. 400, 59 So. 667; Carter v. State, 243 Ala. 575, 11 So. 2d 764.

"And a person is not required to speculate as to the meaning of a statute at the peril of his freedom. Lanzetta v. State of New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888. The intent of the legislature must appear from the face of the statute. Standard Oil Co. v. State, supra."

In the same year, 1957, in *State* v. *Homan,* 38 Ala. App. 642, 92 So. 2d 51, where a trial court had held Code 1940, T. 41, § 221, subdiv. 3, unconstitutional, we reversed. The opinion compasses a number of Alabama cases both of imprecise words and constitutional holdings:

"We are cited to the peeping tom case, Kahalley v. State, 254 Ala. 482, 48 So. 2d 794, 795. The gist of the offense there was for any male person to go 'near and stare * * * into any room * * * not his own or under his control, which is occupied by any female

person * * * .' This case in turn is bottomed on the Fourteenth Amendment to the Federal Constitution via Winters v. People of State of New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840, and other cases therein cited.

"And from the Kahalley decision sprang Connor v. City of Birmingham, 36 Ala. App. 494, 60 So. 2d 474. The offense there was that no two persons of opposite sex (except man and wife and parent and minor child) shall occupy jointly and privately any room in any lodging house, hotel, etc.

[fol. 112] "These cases illustrate what, in the absence of concepts of due process, would nevertheless be obnoxious criminal legislation. Thus in Kahalley the fallacy is exposed by the question, 'How far is near?' In Connor the language, though unambiguous, is so broad and sweeping as to raise a presumption that the legislator would not have so intended unless he had added all inclusive words, and absent the all inclusive words the courts would not attempt to re-legislate, 36 Ala. App. at page 499, 60 So. 2d at page 477.

"Subdivision 3 of Section 221 [T. 41], supra, is severable * * * . * * * we are of the opinion that there is no denial of due process of law nor is the language of the subdivision so vague as to be meaningless. There are no imprecise words such as 'profiteering', 'necessity of life', State v. Goldstein, 207 Ala. 569, 93 So. 308, 'profit, gain or advantage, unusual in the ordinary course of legitimate business', State v. Skinner, 20 Ala. App. 204, 101 So. 327, 329, or 'near', Kahalley v. State, supra. See also Parisian Co. v.

Williams, 203 Ala. 378, at page 383, 83 So. 122 at page 127. * * *"

Since the only stated standards for refusing a permit are those of welfare, peace, safety, health, decency, good order, morals or convenience, we—in addition to overbroadness—find these words, as related to a parade, procession or demonstration, *either sufficiently lacking in preciseness or without a settled applicable common law meaning.*

For example, in *Hague* v. *Committee,* supra, Roberts, J., aptly pointed out that peace on the streets could easily be achieved by suppression.

In the context of long drawn out resort to congested courts for relief, these stated "standards"—truly only sources of power, not means to an end—show § 1159 to be void on its face.

VII.

§ 1159 Is Void as Applied

Yick Wo v. *Hopkins,* supra, held that, though a San Francisco ordinance aimed at fire hazards had a valid surface wording, yet its employment against only Chinese laundrymen was discriminatory.

[fol. 113] Here we have no direct evidence of any other persons being charged with a breach of § 1159 on the same occasion as that of instant concern. Nevertheless, the borderline case made here against Shuttlesworth, coupled with even less plausible presentations reviewed in *Primm* v. *City of Birmingham,* supra, and in two other cases decided here on the authority of *Primm,* at the same time as *Primm,* constitute a pattern of enforcement.

In addition to facts listed in the quotation from Judge Johnson's opinion in *Primm* (set out hereinabove), we

excerpt also from the evidence of one of the arresting officers:

"Q. * * * Were you informed by anyone that no permits had been issued for any such demonstrations?

"A. Yes, sir. At roll call before we came to work they read out this ordinance number to us and said no one had received any permits to hold any kind of demonstrations downtown and they read out the ordinance to us."

And of similar import from *Bentley* v. *City of Birmingham*, 6 Div. 938, decided on authority of *Primm*, we extract:

"Q. Is it a fact, Officer, that the fact that some people might come down in the downtown area with signs was discussed that morning at Police Headquarters?

"A. It was.

"Q. And was the section which Ann Bentley is charged with discussed also at that time?

"A. Yes, it was.

"Q. Who did you discuss it with, Officer?

"A. I believe that the Sergeant read—or, either the Captain read out the ordinance and said it was a violation.

"Q. Could you tell us just what he said with reference to this ordinance?

"Mr. Walker: We object. Well, go ahead and answer that.

"A. If I remember correctly, at roll call they read a lot of different things, read auto stolen reports, and read a lot of things that come in there, and if I remember correctly, I believe they read out the ordi-

nance and said carrying signs would be prohibited. [fol. 114] "Q. Did they describe how big the sign had to be?

"A. They did not.

"Q. Was there anything else said there that you remember?

"A. Not that I recall.

"Q. Did they describe what type of conduct other than carrying signs would constitute an offense?

"A. I don't recall any mention of conduct.

* * * * *

"Q. All that you know about it is that she had the sign on, she was not in the company of anybody, she was walking across the street, and in about six seconds she was arrested?

"A. That is correct.

"Q. She didn't create any disturbance, or block the street, or anything else other than that, is that right?

"A. She did not.

"Q. Didn't endanger anybody's safety, so far as you know?

"A. She did not."

Officer ..... (on cross):

"Q. Now, I believe you stated that you were at the roll call that morning when they gave you orders about making arrests for violation of 1159?

"A. They didn't say make an arrest, they just told us what the ordinance number was in case someone was downtown with signs on.

"Q. Wearing signs?

"A. But, they didn't actually say go out and get them.

"Q. Well, now, what were your specific orders with respect to people wearing signs downtown, if anything?

"A. I don't recall any particular orders. They just notified us of what the situation—of what the City Code was pertaining to such an incident.

"Q. And your understanding was that you were to arrest anybody with a sign on?

[fol. 115] "A. My understanding is to arrest anybody violating the City Code to my knowledge.

"Q. We are not asking about the other sections in the City Code, we are asking specifically about 1159. Did you have specific orders to arrest anybody who was wearing a sign?

"Mr. Walker: We object to that, Your Honor.

"Mr. Shores: Your Honor, we are trying to find out whether or not he was given instructions to cover that these individuals blocked the street, or whether the individuals were creating a disturbance with signs, or just what type of sign.

"Mr. Walker: Your Honor, we are not trying the defendant on what the officer thought, or what orders he was under. The only evidence that will be considered is the evidence admitted here in this court room, and whether the officer was under instructions, or acted even without any instructions, that can make no—have no bearing on the case, because it will be decided from the evidence that comes from the witness stand.

"Mr. Shores: But, since he did say he did have some instruction, the law was read to him, we want to question him about those instructions. They are the ones who brought that out. We didn't know about

they had a little meeting and discussed what they were to do, so that is what we are trying to find out, Your Honor.

"The Court: You may ask him.

"Q. * * * were you given any instructions or any orders as to what type of signs a person must be wearing before you could make an arrest?

"A. No, I don't recall any such orders.

"Q. They didn't tell you how large the sign was to be, or how small?

"A. No, there was no mention as to size.

"Q. Well, specifically what was said at this roll call with respect to 1159?

"A. I don't remember the exact conversation. All I know they read out—they said Article 1159 will cover any demonstrations, or parades, or carrying signs downtown. They didn't mention what kind of—what the signs were to say, or what size, or what color or anything of that nature.

"Q. In other words, they gave you instructions coupled with that reading as to what it would require to make the arrest? One of the requirements was that a person must have a sign on?

[fol. 116] "A. That's right.

"Q. And that was all, and that is all you arrested them for, is that correct?

"A. That is correct."

For a case to reach here after a city arrest, it must go through two tiers of judicial proceedings: *first*, a trial before the city recorder; and, *second*, on appeal from a conviction, a trial de novo in the circuit court.

Trial in the circuit court can only be had on the city attorney's filing (unless waived) of a new complaint.

Accordingly, a case might come before the recorder without counsel for the city being aware of the prosecution in detail before trial. In the circuit court, the city's attorney, under his client's instruction, is an indispensable actor.

This pattern of enforcement exhibits a discrimination within the rule of *Yick Wo* v. *Hopkins,* supra.

IX.

There Was Insufficient Evidence to Sustain the Charge

In a city ordinance prosecution, the city must sustain its case by proof to the same degree required in case of an indictable offense, to convince the jury from the evidence beyond a reasonable doubt.

Here, we consider the proof weighed in this scale fails to show a procession which would require, under the terms of § 1159, the getting of a permit.

No evidence came in as to whether or not the pedestrians in question—fifty-two in number, about a football squad with attendants—acted as a cohesive unit as a military group would march.

[fol. 117] The City failed to show whether or not other pedestrians were run off the sidewalk, blocked either in access, process or transit. No evidence showed whether or not the group disobeyed traffic lights or officers directing crossings. There was no evidence of jaywalking or wandering onto the roadway.

Were it not for the singing and clapping[13] and some spurts of activity indicative of the appellant being a

[13] *State* v. *Hughes,* 72 N. C. 25.

puisne leader under Dr. King, in conjunction with the broad definition of "street" in the City Code as embracing the public sidewalk alongside, we might not have gone to such lengths of demonstration.

The Georgia Court of Appeals, in *Montgomery* v. *Mayor, etc., of Athens,* 105 Ga. App. 57, 123 S. E. 2d 339, where a number of men (bearing signs with slogans with scriptural citations) picketed the University of Georgia campus while the Attorney General of the United States spoke within, had this to say:

> "The undisputed facts in this case show that the petitioners did not obstruct or interfere with either vehicular traffic or pedestrian traffic and were not engaged in any activity which would require a police escort to direct traffic in conjunction therewith. Not only did they not unreasonably burden and interfere with the normal use of the streets by the public in the City of Athens but the undisputed facts show that their activity did not burden or interfere with the normal use of the streets in any manner whatsoever. We are therefore of the opinion that the activity of the petitioners on this occasion did not constitute a parade as contemplated by the ordinance or by the usually accepted definition of a parade. * * * "

Here, the trial court erred in overruling the appellant's motion to exclude the evidence for want of a prima facie case.

[fol. 118]

X.

Limitation of Opinion

When this case arose, *Cox* v. *Louisiana,* supra, was not announced. *Freedman* v. *Maryland,* supra, was waiting

in the wings. The trial judge rested on a more vigorous *Cox* v. *New Hampshire,* supra.

We emphasize that we have only before us a walking on city sidewalks. In the use of the roadway probably less stringent standards of construction would prevail against the prosecutor.

Moreover, we do not doubt the potentiality of the City's adopting an ordinance without suppressing free expression or locomotion. We quote from *Cox* v. *Louisiana,* supra, per Goldberg, J.:

"* * * The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, *and not susceptible to abuses of discriminatory application,* cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and

available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations. * * *

* * *

"We have no occasion in this case to consider the constitutionality of the uniform, consistent, and [fol. 119] nondiscriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings. * * *" (Italics added.)

Ordered liberty is the end for which we enforce laws, not the wish for self-immolation. On the bones of the martyrs to his tyranny man has never built a lasting system of Law.

Lord Acton in 1877 perceived the interplay between rights and duties, between competing claims of rights—saying:

"* * * At all times sincere friends of freedom have been rare, and its triumphs have been due to minorities, that have prevailed by associating themselves with auxiliaries whose objects often differed from their own; and this association, which is always dangerous, has been sometimes disastrous, by giving to opponents just grounds of opposition, and by kindling dispute over the spoils in the hour of success. No obstacle has been so constant, or so difficult to overcome, as uncertainty and confusion touching the nature of true liberty. If hostile interests have wrought much injury, false ideas have wrought still more; and its advance is recorded in the increase of knowl-

edge, as much as in the improvement of laws. The history of institutions is often a history of deception and illusions; for their virtue depends on the *ideas* that produce and on the *spirit* that preserves them, and the form may remain unaltered when the substance has passed away." (Italics added.)

X.

Conclusion

The appellant had standing to question the ordinance. *Staub* v. *Baxley,* supra; *Freedman* v. *Maryland,* supra.

We consider that (1) § 1159 of the 1944 General Code of the City of Birmingham, certainly as to the use of sidewalks by pedestrians, is void for vagueness because of overbroad, and consequently meaningless, standards for the issuance of permits for processions; (2) said § 1159 has been enforced in a pattern without regard to even the meaning here claimed for by the City to such an extent as to make it unconstitutional as applied to [fol. 120] pedestrians using the sidewalks; and (3) the City failed to make a case, under the purported meaning of § 1159, of there being a need for the appellant in this case to be covered by a permit to use the sidewalk in company with others.

Therefore, the judgment below is due to be reversed and the appellant is due to be discharged sine die.

Reversed and Rendered.

Dissenting Opinion

[fol. 121]

JOHNSON, J., (dissenting)

The complaint filed in the circuit court by the City's attorney charges that appellant "did take part or participate in a parade or procession on the streets of the City without having secured a permit therefor from the commission, contrary to and in violation of Sec. 1159 of the General City Code of Birmingham of 1944."

The evidence, as introduced by the City, tended to show that during the afternoon of Friday, April 12, 1963, approximately 52 persons, most of whom were Negroes, departed from a church in the 1400 block of 6th Avenue North in Birmingham, grouped "in formation" on the sidewalk in front of the church, and then walked "in formation" along the sidewalks for several blocks. Their route followed east from the church along 6th Avenue North to 17th Street, then south along 17th Street one block to 5th Avenue North, and then east again along 5th Avenue North towards 18th Street. They were stopped by a policeman in the middle of the block between 17th and 18th Streets. "Spectators" lining the route fell in behind and followed the group in formation as they passed by. This crowd of "spectators"—consisting of several hundred persons—did not walk in formation and had no discernible organization. There were also a number of photographers present. The appellant, who is a preacher, left the church with the people who walked in formation. He was observed entering the church wearing a business suit, and when he left the church he was wearing a black shirt and "bluejean" trousers. Rev. Martin Luther King and Rev. A. B. Abernathy led the group in formation. They were dressed in attire similar to that

worn by appellant. The group in formation sang and clapped hands as they proceeded along the sidewalk, but were otherwise orderly. No permit was issued for a parade or procession to be held on April 12, 1963. There is no evidence concerning whether anyone applied for such permit.

[fol. 122] Police Officer R. N. Higginbotham, a witness for the City, was at 5th Avenue North and 18th Street when he first observed the alleged parade or procession. He testified that the group in formation turned on to 5th Avenue from 17th Street and proceeded east on the sidewalk on the north side of 5th Avenue, that this group was marching four to six abreast "all the way across the sidewalk", and that he stopped them in the middle of the block between 17th and 18th Streets. He stated that the crowd following the group in formation was in the center of the street, and also that he observed appellant in the group in formation, in the "third or fourth row back."

Police Officer Edward Ratigan, a witness for the City, testified that he followed the alleged parade or procession from the church on 6th Avenue to where it was stopped on 5th Avenue; that the group in formation consisted of 52 persons marching two abreast, approximately forty inches apart; and that this formation persisted until the group was stopped. He further stated that appellant was at no time in line with a partner in the marching group but was walking along side the group talking to them, and giving them encouragement. Police Officer Herman Evers testified that appellant was "bounding from the front to the rear" of the marching group "waving his arms to come on, telling them to come on."

Appellant's evidence consists of the testimony of five witnesses, including himself. His evidence tends to show that approximately 52 persons left the church on 6th Avenue North and walked two abreast on the sidewalks for several blocks; that appellant left the church with the group and walked a few blocks in the same direction; that he was not walking with a partner in this group but was walking at times beside the group, counseling them to be quiet and orderly; that he also tried to prevent [fol. 123] bystanders or spectators from joining the marching group; and that he left the scene before any of the group in formation was arrested. Appellant referred to the group in formation as "marchers."

Appellant contends that the court erred in overruling his motion to exclude the City's evidence because (1) there is no evidence of a parade or procession, (2) assuming arguendo there was a parade or procession, it occurred on the sidewalk and not in the streets as alleged in the complaint, and (3) there is no evidence that appellant took part or participated in such parade or procession.

The statute does not attempt to define a parade or procession. Parade is defined in Webster's New International Dictionary, Second Edition, as follows:

> "Any march or procession; esp. a formal public procession; the movement of any body marshalled in something like military order; as, a parade of firemen; a circus parade.
>
> Procession is defined in Webster's New International Dictionary, Second Edition. as follows:
>
> "A group, esp. of persons or of vehicles containing persons, moving onward in an orderly, cere-

> monious, or solemn parade; as a religious procession; to go in procession to the capitol; to form a procession."

In *Cox* v. *New Hampshire,* 312 U. S. 589, 61 S. Ct. 762, 85 L. Ed. 1049, the Supreme Court of the United States had before it the question of whether a group of fifteen to twenty members of a religious sect marching along the sidewalk in single file carrying placards constituted a "parade or procession" within the meaning of a New Hampshire Statute prohibiting a parade or procession without a license. The question was answered in the affirmative by a unanimous court. Chief Justice Hughes, speaking for the court, stated:

> "There appears to be no ground for challenging the ruling of the state court that appellants were in fact engaged in a parade or procession upon the public streets. As the state court observed: 'It was a march in formation, and its advertising and informatory purpose did not make it otherwise . . . It is immaterial that its tactics were few and simple. *It is enough that it proceeded in an ordered and close file as a collective body of persons on the city streets.*" (Emphasis added)

Here, the City's evidence establishes that a substantial number of persons, upon leaving the same church at the same time, gathered in formation in front of that [fol. 124] church and while maintaining formation marched on the sidewalks along the streets for several blocks, two to six abreast. They were singing and clapping their hands. The group was led and directed by ministers or preachers. The marchers attracted a crowd of spectators,

and some photographers. This evidence established, in my opinion, a common intent to march on the streets as an organized, collective body of persons. It was a movement of a body of persons marshalled in something like military order. It was a "parade or procession" within the meaning of Section 1159, supra.

Appellant's contention that the parade or procession did not occur in the street is without merit. A look at Section 2 of the General City Code of Birmingham of 1944 discloses an intent to treat sidewalks as part of the streets. Section 2 reads in part:

> "Sec. 2. Definitions and rules of construction.
>
> "In the construction of this code and of all ordinances, the following definitions and rules shall be observed, unless the context clearly requires otherwise.
>
> * * *
>
> "Sidewalk: The term 'sidewalk' shall mean that portion of a street between the curb line and adjacent property line."

In common parlance, a "sidewalk" is the part of a street assigned to the use of the pedestrians. *Smith* v. *City of Birmingham,* 42 Ala. App. 457, 168 So. 2d 35.

A parade or procession may be held on the sidewalk as well as that part of the street set aside for vehicular traffic. See *Cox* v. *New Hampshire,* supra. Sec. 1159, supra, prohibits a parade or procession on any portion of the street, including the sidewalk.

The evidence clearly establishes that appellant took part or participated in the parade or procession. If we reject the testimony of Officer Higginbotham to the effect that appellant was in the group in formation, which

I do not, the testimony of other police officers to the effect [fol. 125] that appellant walked beside the marching group giving them instructions is sufficient to establish that he participated in the parade or procession. One who assumes duties similar to a drill sergeant in a military parade, as did appellant, takes part or participates in a parade or procession.

Appellant contends that Section 1159 "vests in the commission the power to restrain free expression without establishing reasonable standards for the use of such power," and therefore violates the First Amendment to the United States Constitution, which is protected against state action by the Fourteenth Amendment.

Although the right to engage in a parade is one phase of the exercise of the fundamental right of free speech and assembly, such right is subject to reasonable and nondiscriminating regulation and limitation.

In Cox v. New Hampshire, supra, Chief Justice Hughes wrote:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintain public order without which liberity itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the

interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. * * * As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

[fol. 126] In *Kunz* v. *New York,* 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 28, Mr. Justice Jackson wrote that "cities throughout the country have adopted the permit requirement to control private activities on public streets and for other purposes." Ordinances of this character have been in effect in most municipalities of Alabama for many years. The authority to enact such ordinances is given by Section 455, Title 37, and Section 654, Title 62, Code of Alabama 1940.

It is the duty of this Court not to strike down a city ordinance as unconstitutional if by a reasonable construction it can be given a field of operation within constitutional limits. See *City of Mobile* v. *Coffin,* 28 Ala. App. 243, 181 So. 795. Where an ordinance is susceptible of two constructions, one of which will defeat the ordinance and the other will support it, the latter construction will be adopted. *Birmingham Ry., Light & Power Co.* v. *Kyser,* 203 Ala. 121, 82 So. 151. "A municipal ordinance must be construed with a view towards the purpose for which it was adopted. *City of Birmingham* v. *Mauzey,* 214 Ala. 476, 108 So. 382.

Dissenting Opinion

I think it is obvious that this ordinance—Section 1159—was not designed to suppress in any manner freedom of speech or assembly, but to reasonably regulate the use of the streets in the public interest. It does not seek to control what may be said on the streets, and is applicable only to organized formations of persons, vehicles, etc., using the streets and not to individuals or groups not engaged in a parade or procession. The requirement that the applicant for a permit state the course to be travelled, the probable number of persons, vehicles and animals, and the purpose of the parade is for the purpose of assisting municipal authorities in deciding whether or not the issuance of a permit is consistent with traffic conditions. Thus, the required information is related to [fol. 127] the proper regulation of the use of the streets, and the fact that such information is required indicates that the power given the licensing authority was not to be exercised arbitrarily or for some purpose of its own. The requirement that the applicant state the purpose of the parade or procession does not indicate an intent to permit the Commission to act capriciously or arbitrarily. The purpose may have a bearing on precautions which should be taken by municipal authorities to protect parades or the general public.

Section 1159, supra, provides that the Commission shall issue a permit "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." I do not construe this as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. The standard to be applied

is obvious from the purpose of the ordinance. It would be of little or no value to state that the standard by which the Commission should be guided is safety, comfort and convenience of persons using the streets, and, due to varying traffic conditions and the complex problems presented in maintaining an orderly flow of traffic over the streets, it would be practically impossible to formulate in an ordinance a uniform plan or system relating to every conceivable parade or procession. The members of the Commission may not act as censors of what is to be said or displayed in any parade. If they should act arbitrarily, resort may be had to the courts. It is reasonable to assume from the facts in this case that the Commission would have granted appellant a permit to engage in the parade if such permit had been sought. A denial would have been warranted only if after a required investigation it was found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly [fol. 128] disturbed.

My conclusions are fully sustained by the decision in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508. In that case the court was called upon to determine the constitutionality of a state statute prohibiting a parade or procession on the streets without a permit from local authorities. The statute did not set out a standard for granting or refusing the permit. The court overruled the defendant's contention that the statute vested unfettered control in the licensing authorities. In answering this contention, the court said:

> "The act is implicit in its requirement that the licensing authority act reasonably in granting or deny-

ing licenses, and with reference to the object of public order on the public ways. If it does not in express terms 'make comfort or convenience in the use of streets * * * the standard of official action' (Hague v. Committee for Industrial Organization, 307 U. S. 496, 516, 59 S. Ct. 954, 964, 83 L. Ed. 1423) the necessary inference is that it does, based upon the presumption in favor of the validity of legislation as reinforced by the express provision of the act bestowing 'delegated powers' upon the authority, as a grant intended to be only of due legislative power which may properly be delegated. The discretion thus vested in the authority is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has, and the legislature attempted to delegate no power it did not possess."

The United States Supreme Court, in a unanimous decision, held that the statute, as construed by the Supreme Court of New Hampshire, violated no federal constitutional rights of the defendants. *Cox* v. *New Hampshire,* supra.

The construction adopted by the Supreme Court of New Hampshire is sound. I would place the same construction upon the ordinance here for review.

There is nothing in the record before us tending to show that the ordinance has been applied in other than a fair and non-discriminatory manner. I cannot agree that [fol. 129] this case, coupled with *Primm* v. *City of Birmingham*, —— Ala. App. ——, 177 So. 2d 236, and the two cases decided on authority of Primm constitutes a pattern of enforcement. No violation of *Yick Wo* v. *Hopkins*, 118 U. S. 356, has been argued, nor does such violation appear from the record or extrinsically.

So evanescent are the issues in the majority opinion, I most respectfully dissent.

[fol. 130]

Judgment

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1965-66

6 Div. 979

Fred L. Shuttlesworth

v.

City of Birmingham

Appeal from Jefferson Circuit Court

October 3, 1963	CERTIFICATE FILED
December 26, 1963	TRANSCRIPT FILED
February 27, 1964	COME THE PARTIES BY ATTORNEYS, AND SUBMIT THIS CAUSE ON BRIEFS FOR DECISION.

(JUDGMENT)

November 2, 1965

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on brief and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court, there is manifest error. It is therefore considered that the judgment of the Circuit Court be reversed and annulled, and judgment rendered, discharging appellant. (Johnson. J., dissents.)

[fol. 1]

PROCEEDINGS IN THE SUPREME COURT OF ALABAMA

IN THE

SUPREME COURT OF ALABAMA

SIXTH DIVISION

No. 291

CITY OF BIRMINGHAM, a Municipal Corporation,

Petitioner,

vs.

FRED L. SHUTTLESWORTH,

Respondent.

Petition for Certiorari to Court of Appeals

(Filed January 5, 1966)

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:

Your petitioner, the City of Birmingham, a municipal corporation, hereby respectfully petitions this Honorable Court to review and determine the decision rendered by the Court of Appeals of Alabama on the 2nd day of November, 1965, in that certain appeal in that Court numbered and styled #979 Division 6, Fred L. Shuttlesworth, Appellant v. City of Birmingham, Appellee, on appeal from the Circuit Court of the Tenth Judicial Circuit of Alabama.

[fol. 2] Petitioner avers that it has duly filed its application for rehearing in said Court of Appeals in said cause within the time required by law and raising the points hereinafter set forth, and that said application for rehearing has been decided adversely to the movant by said Court of Appeals on the 21st day of December, 1965.

Your petitioner respectfully shows unto the Court that this cause is a prosecution by the appellee against the appellant for the violation of Section 1159 of the General City Code of Birmingham, Alabama, of 1944 which reads as follows:

> "It shall be unlawful to organize or hold or to assist in organizing or holding, or to take part or participate in any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.
>
> To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals, which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be re-

fused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions."

The Court submitted the case to the jury and the jury returned a verdict in favor of the appellee and judgment was entered accordingly; that the points of law involved which petitioner claims should be reviewed and revised by this Supreme Court are as follows:

[fol. 3] 1. Wherein, the Court of Appeals held that Section 1159 of the General Code of Birmingham of 1944 imposed an invidious prior restraint on a facet of free speech.

2. Wherein, the Court of Appeals held that Section 1159 of the General Code of Birmingham of 1944 lacks ascertainable standards for the issuance of a parade permit.

3. Wherein, the Court of Appeals held that Section 1159 of the General Code of Birmingham of 1944 has been applied in a pattern of discrimination within the rule of *Yick Wo* v. *Hopkins,* 118 US 356, 6 S. Ct. 1064, and therefore is void as applied.

4. Wherein, the Court of Appeals held that the evidence (as set out in its opinion) was insufficient to sustain a conviction for the violation of Section 1159 of the General Code of Birmingham of 1944.

5. Wherein, the Court of Appeals held that appellant had standing to question the validity of Section 1159 of the General Code of Birmingham of 1944.

Wherefore, your petitioner most respectfully requests that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding and requiring said court to certify and send to this Court on a day certain to be designated by this court, a full and complete transcript of the record and all proceedings of said Court of Appeals of Alabama, in the cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court as provided by law and the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors complained of, and to reverse the judgment of the Court of Appeals, or render such judgment as said Court should have rendered. [fol. 4] Petitioner requests that this Honorable Court suggest and require the Court of Appeals to stay or recall its certificate of judgment of reversal of said cause pending the determination of this petition and decision by this Honorable Court in said petition.

Submitted herewith is a brief and argument in support of this petition.

Respectfully submitted,

/s/ WILLIAM C. WALKER
Attorney for Petitioner,
City of Birmingham

CERTIFICATE

This is to certify that a copy of the foregoing Petition for Certiorari was served on Jack Greenberg, Norman C. Amaker and Frank H. Heffron, Attorneys for Appellant, by depositing same in the United States Mail, postage prepaid, addressed to them at 10 Columbus Circle, New York, New York, 10019; and a copy of same was served upon Arthur Shores and Orzell Billingsley, Jr., at their offices in the A. G. Gaston Building and at 1630 Fourth Avenue North, respectively, in the City of Birmingham, Alabama, this 4 day of January, 1966.

/s/ WILLIAM C. WALKER
Attorney for Appellee,
City of Birmingham

[fol. 5]

Order Granting Writ

JANUARY 20, 1966

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1967-68

6th Div. 291

Ex parte: City of Birmingham.

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS
(Re: Fred L. Shuttlesworth v. City of Birmingham)

Upon a preliminary examination of the Petition for Writ of Certiorari to the Court of Appeals, this Court concluding there is probability of merit in the Petition and that the Writ should issue,

HEREBY ORDERS that the Writ issue, and the cause shall stand for resubmission on briefs or oral argument, if so desired, as provided by Revised Supreme Court Rule 39.

[fol. 6]

Opinion

FILED
NOVEMBER 9, 1967
Supreme Court of Alabama
J. O. SENTELL
Deputy Clerk

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1967-68

6th Div. 291

Ex parte City of Birmingham

In re Fred L. Shuttlesworth

v.

City of Birmingham

Petition for Certiorari to Court of Appeals

LAWSON, JUSTICE.

Fred L. Shuttlesworth was convicted in the Recorder's Court of the City of Birmingham of parading without a [fol. 7] permit in violation of § 1159 of the General City Code of Birmingham, hereinafter referred to as § 1159, which reads:

> "It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other

public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

"To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

[fol. 8] "The two preceding paragraphs, however, shall not apply to funeral processions."

The word "commission" as used in § 1159 refers to the governing body of the City of Birmingham.

Following his conviction in the Recorder's Court, Shuttlesworth appealed to the Circuit Court of Jefferson County, where there was a de novo trial before a jury. The jury found Shuttlesworth guilty and the trial court, after rendering a judgment in accordance with the verdict of the jury, sentenced Shuttlesworth to pay a fine of $75 and to perform ninety days hard labor for the City of Birmingham.

Shuttlesworth then appealed to the Court of Appeals of Alabama which court, in a two-to-one decision, reversed the judgment of the Circuit Court of Jefferson County and rendered a judgment discharging Shuttlesworth "sine die." Judge Cates wrote the majority opinion, in which Presiding Judge Price concurred. Judge Johnson dissented.—*Shuttlesworth* v. *City of Birmingham,* 43 Ala. App. 68, 180 So. 2d 114.

The City of Birmingham filed petition in this court for a writ of certiorari to review and revise the opinion and judgment of the Court of Appeals. We granted the writ.

While we are not altogether certain as to the exact reasons why the majority of the Court of Appeals concluded that Shuttlesworth's conviction should be reversed and that he should be discharged sine die, we will treat [fol. 9] that opinion as holding that § 1159 is void on its face because of overbroad and consequently meaningless standards for the issuance of permits for parades or processions; that said section has been enforced by the City of Birmingham in such a way as to make it unconstitutional under the holding of the Supreme Court of the United States in *Yick Wo* v. *Hopkins,* 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; that the evidence adduced by the City of Birmingham in the trial in the circuit court was insufficient to present a jury question as to whether Shuttlesworth had, in fact, been engaged in a parade, procession or other public demonstration in the streets orother public ways of the City of Birmingham without first having obtained a permit as required by § 1159.

In view of the fact that there was a dissenting opinion, we have gone to the original record to determine the facts.

Opinion

The majority opinion of the Court of Appeals does not contain a complete statement of the facts. However, the dissenting opinion of Judge Johnson contains a rather lengthy recitation of the facts and our examination of the original record shows that the facts as stated in the dissenting opinion are fully supported by the record.

The dissenting opinion, unlike the majority opinion of the Court of Appeals, takes cognizance of the rule so often stated by the appellate courts of this state, to the [fol. 10] effect that it is the duty of courts not to strike down a city ordinance or a statute as unconstitutional, if by reasonable construction it can be given a field of operation within constitutional limits and that where a statute or ordinance is susceptible of two constructions, one of which will defeat the ordinance or statute and the other will uphold it, the latter construction will be adopted.

With that rule in mind, Judge Johnson proceeds to construe § 1159, saying:

> "I think it is obvious that this ordinance—Section 1159—was not designed to suppress in any manner freedom of speech or assembly, but to reasonably regulate the use of the streets in the public interest. It does not seek to control what may be said on the streets, and is applicable only to organize [sic] formations of persons, vehicles, etc., using the streets and not to individuals or groups not engaged in a parade or procession. The requirement that the applicant for a permit state the course to be travelled, the probable number of persons, vehicles and animals, and the purpose of the parade is for the purpose of assisting municipal authorities in deciding whether or not the issuance of a permit is consistent with

traffic conditions. Thus, the required information is [fol. 11] related to the proper regulation of the use of the streets, and the fact that such information is required indicates that the power given the licensing authority was not to be exercised arbitrarily or for some purpose of its own. The requirement that the applicant state the purpose of the parade or procession does not indicate an intent to permit the Commission to act capriciously or arbitrarily. The purpose may have a bearing on precautions which should be taken by municipal authorities to protect parades or the general public.

"Section 1159, supra, provides that the Commission shall issue a permit 'unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused.' I do not construe this as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. The standard to be applied is obvious from the purpose of the ordinance. It would be of little or no value to state that the [fol. 12] standard by which the Commission should be guided is safety, comfort and convenience of persons using the streets, and, due to varying traffic conditions and the complex problems presented in maintaining an orderly flow of traffic over the streets, it would be practically impossible to formulate in an ordinance a uniform plan or system relating to every conceivable parade or procession. The members of the Commission may not act as censors of what

is to be said or displayed in any parade. If they should act arbitrarily, resort may be had to the courts. It is reasonable to assume from the facts in this case that the Commission would have granted appellant a permit to engage in the parade if such permit had been sought. A denial would have been warranted only if after a required investigation it was found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly disturbed." (180 So. 2d, 144)

We agree with and adopt the construction which Judge Johnson has placed on § 1159 and we agree with his observations to the effect that such construction finds [fol. 13] support in the case of *State* v. *Cox,* 91 N. H. 137, 16 Atl. 2d 508, which case was affirmed, in a unanimous decision, by the United States Supreme Court.—*Cox* v. *State of New Hampshire,* 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049.

The New Hampshire Supreme Court, as is pointed out in Judge Johnson's dissenting opinion, was called upon to determine the constitutionality of a state statute prohibiting, among other things, a parade or procession on the streets without a permit from local authorities. The New Hampshire statute did not set out a standard for granting or refusing the permit. The language of the New Hampshire court answering the assertion that the statute under consideration vested unwarranted control in the licensing authorities is quoted in Judge Johnson's opinion and will not be repeated here.

In the New Hampshire case, the marchers were divided into four or five groups, each composed of about fifteen to

twenty persons. Each group proceeded to a different part of the business district of the City of Manchester and then lined up in a single-file formation and marched along sidewalks of the city in such a formation. The marchers carried banners and distributed leaflets announcing a meeting to be held at a later time where a talk on government would be given to the public free of charge. The marchers had no permit. Despite that fact that the marchers were [fol. 14] carrying banners and distributing leaflets as well as marching, their conviction of parading without a permit was affirmed by the Supreme Court of New Hampshire.—*State* v. *Cox, supra.*

In affirming the judgment of the Supreme Court of New Hampshire, the Supreme Court of the United States in *Cox* v. *New Hampshire, supra,* said in part as follows:

> "The sole charge against appellants was that they were 'taking part in a parade or procession' on public streets without a permit as the statute required. They were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or for issuing invitations to a public meeting, or for holding a public meeting, or for maintaining or expressing religious beliefs. Their right to do any one of these things apart from engaging in a 'parade or procession' upon a public street is not here involved and the question of the validity of an ordinance addressed to any other sort of conduct than that complained of is not before us.
>
> "There appears to be no ground for challenging the ruling of the state court that appellants were [fol. 15] in fact engaged in a parade or procession upon the public streets. As the state court observed:

'It was a march in formation, and its advertising and informatory purpose did not make it otherwise. . . . It is immaterial that its tactics were few and simple. It is enough that it proceeded in an ordered and close file as a collective body of persons on the city streets.'

* * *

"If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right." (312 U. S., 573-576)

We would like to point out that we do not construe § 1159 as conferring upon the "commission" of the City [fol. 16] of Birmingham the right to refuse an application for a permit to carry on a parade, procession or other public demonstration solely on the ground that such activities might tend to provoke disorderly conduct. See *Edwards* v. *South Carolina*, 372 U. S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697.

We also hold that under § 1159 the Commission is without authority to act in an arbitrary manner or with unfettered discretion in regard to the issuance of permits. Its discretion must be exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just

order of treatment with reference to the convenience of public use of the streets and sidewalks must be followed. Applications for permits to parade must be granted if, after an investigation it is found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed.

Since the Court of Appeals of Alabama rendered its decision and judgment in the case here under review, the Supreme Court of the United States rendered a decision in a case wherein § 1159 was involved. See *Wyatt Tee Walker* v. *City of Birmingham,* decided by the Supreme Court of the United States on June 12, 1967, 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——. Application for rehearing was denied on October 9, 1967. The [fol. 17] Walker case, *supra,* was in the Supreme Court of the United States on writ of certiorari to review the opinion and judgment of this court in the case of *Walker et al.* v. *City of Birmingham,* 279 Ala. 53, 181 So. 2d 493, wherein we affirmed the conviction of Walker and several others, including Shuttlesworth, of criminal contempt for violating a temporary injunction issued by the Circuit Court of Jefferson County, in Equity, which enjoined Walker, Shuttlesworth and others from engaging in, sponsoring, inciting or encouraging mass street parades or mass processions or mass demonstrations without a permit. The injunction enjoined the respondents from carrying on other activities which we do not think necessary to comment on here. In our case of *Walker et al.* v. *City of Birmingham,* 279 Ala. 53. 181 So. 2d 493, we did not expressly pass on the constitutionality of § 1159, although the petitioners, that is, Walker, Shuttlesworth and others, asserted that said § 1159 is void because it violates the First and Fourteenth Amendment to the Constitution of

the United States. Based on that premise, the said petitioners also argued that the temporary injunction was void as a prior restraint on the constitutionally protected rights of freedom of speech and of assembly.

Our affirmance of the criminal contempt convictions was based on the principle "that the circuit court had the duty and authority, in the first instance, to determine the [fol. 18] validity of the ordinance, and, until the decision of the circuit court is reversed for error by orderly review, either by the circuit court or a higher court, the orders of the circuit court based on its decision are to be respected and disobedience of them is contempt of its lawful authority, to be punished. Howat v. State of Kansas, 258 U. S. 181, 42 S. Ct. 297, 66 L. Ed. 550."

As we have heretofore indicated, the Supreme Court of the United States on June 12, 1967, affirmed our judgment in *Walker et al.* v. *City of Birmingham,* 279 Ala. 53, 181 So. 2d 483. The Supreme Court of the United States divided five to four. It appears from the Court's opinion, written by Mr. Justice Stewart, and from the opinions of the dissenting Justices, that the petitioners in the Supreme Court of the United States again asserted that § 1159 was void on its face. The dissenting Justices expressed the view that § 1159 is unconstitutional on its face.

However, the majority of the Court, as then constituted, did not hold that § 1159 is void on its face. The Court's opinion contains the following language:

> "The generality of the language contained in the Birmingham parade ordinance [§1159] upon which the injunction was based would unquestionably raise substantial constitutional issues concerning some of

[fol. 19] its provisions. Schneider v. State, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574; Kunz v. People of State of New York, 34 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 280. The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire Courts in Cox. v. New Hampshire [312 U. S. 579, 71 S. Ct. 762, 85 L. Ed. 1049] and Poulos v. New Hampshire [345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105], both supra. Cf. Shuttlesworth v. City of Birmingham, 382 U. S. 87, 91, 86 S. Ct. 211, 213, 15 L. Ed. 2d 176; City of Darlington v. Stanley, 239 S. C. 139, 122 S. E. 2d 207. *Here, just as in Cox and Poulos, it could not be assumed that the ordinance was void on its face.*" (Emphasis supplied) (87 S. Ct., 1830)

The language which we have just italicized seems to us to be in direct conflict with the conclusion reached in the [fol. 20] majority opinion of the Court of Appeals of Alabama here under review.

We are of the opinion that the construction which Judge Johnson placed on § 1159 in his dissenting opinion, which we have in effect adopted, together with the construction which we have placed on § 1159 in this opinion, requires a reversal of the judgment of the Court of Appeals here under review.—*Cox* v. *New Hampshire,* 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; *Walker et al.*

v. *City of Birmingham*, 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——.

We hold that § 1159 is not void on its face and that under the construction which we have placed on that section, it did not deprive Shuttlesworth of any right guaranteed to him under the First and Fourteenth Amendments to the Constitution of the United States.

We are also in accord with the conclusion reached by Judge Johnson in his dissenting opinion to the effect that there is nothing in the record before us tending to show that § 1159 has been applied in other than a fair and non-discriminatory fashion. The record before us shows no violation of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.

The petitioners in the case of *Wyatt Tee Walker et al.* v. *City of Birmingham*, 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——, decided by the Supreme Court of [fol. 21] the United States on June 12, 1967, asserted that they were free to disobey the injunction because § 1159, on which the injunction was based, had been administered in an arbitrary and discriminatory fashion. In support of that contention those petitioners had sought to introduce evidence in the trial court to the effect that a few days before the injunction issued requests for permits to picket had been made to a member of the City Commission and one request had been rudely refused and that this same official had later made it clear that he was without power to grant the permit alone, since the issuance of permits was the responsibility of the entire Commission. The Supreme Court of the United States, in answering that contention, said as follows: "Assuming the truth of the proffered evidence, it does not follow that the parade ordinance is void on its face."

We see no occasion to deal at length with the holding or observation contained in the majority opinion of the Court of Appeals of Alabama to the effect that the evidence was insufficient to show that Shuttlesworth had engaged in a parade on the "streets or other public ways of the City of Birmingham without a permit." The evidence as delineated in the dissenting opinion of Judge Johnson, in our opinion, clearly shows that such a violation occurred.

We can see no merit in the position apparently taken in the majority opinion of the Court of Appeals of Alabama [fol. 22] to the effect that since the marchers paraded on the sidewalks of the City of Birmingham rather than in the streets, there had been no violation of said § 1159.

Section 2 of the General City Code of Birmingham of 1944 reads in part:

> "Sec. 2. Definitions and rules of construction.
>
> "In the construction of this code and of all ordinances, the following definitions and rules shall be observed, unless the context clearly requires otherwise.
>
> * * *
>
> "Sidewalk: The term 'sidewalk' shall mean that portion of a street between the curb line and adjacent property line."

It is appropriate to note that the statute under consideration in the case of *State* v. *Cox*, 91 N. H. 137, 16 Atl. 2d 508, prohibited a parade or procession on streets without a permit from local authorities. The parade or procession in which Cox was involved occurred on the sidewalks of the city of Manchester. Neither the Supreme

Court of New Hampshire nor the Supreme Court of the United States took the position that the statute involved did not apply to sidewalks as well as to the portion of the street generally used by vehicular traffic. Cox's [fol. 23] conviction of parading without a permit was upheld by the courts.

We are aware of the fact that ordinances somewhat similar to § 1159 have been declared unconstitutional in two recent federal cases. See *Gayat* v. *Pierce* (U. S. Court of Appeals, 5th Circuit), 372 F. 2d 658; *Baker et al.* v. *Binder,* decided in the United States District Court for the Western District of Kentucky at Louisville. That was a three-judge court, with one judge dissenting. No reference was made in the opinions delivered in those cases to *Walker et al.* v. *City of Birmingham,* 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——. Perhaps we have placed too much reliance on *Walker et al.* v. *City of Birmingham,* 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——, and on *Cox* v. *New Hampshire,* 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049. We may have misinterpreted the opinions in these cases. If so, we will no doubt be set straight.

In view of the foregoing, the judgment of the Court of Appeals is reversed and the cause is remanded to that court.

REVERSED AND REMANDED.

Livingston, C. J., Goodwyn, Merrill, Coleman and Harwood, JJ., concur.

[fol. 25]

Judgment

NOVEMBER 9, 1967
THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1967-68

6th Div. 291
C/A 6th Div. 979

Ex parte: City of Birmingham,
a Municipal Corporation

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS
(Re: Fred L. Shuttlesworth v. City of Birmingham)

WHEREAS, on January 20, 1966, the Writ of Certiorari to the Court of Appeals was granted, and said cause was set down for submission on briefs or oral argument; WHEREUPON,

Comes the petitioner, by its attorney, and the Petition for Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Court of Appeals there is manifest error.

IT IS THEREFORE ORDERED AND ADJUDGED that the judgment of the Court of Appeals be reversed and annulled and the cause remanded to said Court for further proceedings therein.

IT IS FURTHER ORDERED AND ADJUDGED that the costs incident to this proceeding be taxed against the respondent, Fred L. Shuttlesworth, for which costs let execution issue.

Judgment

I, J. O. Sentell, Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 9 day of November, 1967.

/s/ J. O. SENTELL
Deputy Clerk Supreme Court of Alabama

[fol. 26]

Application for Stay

IN THE

SUPREME COURT OF ALABAMA

SIXTH DIVISION

No. .....

FRED L. SHUTTLESWORTH,

Petitioner,

vs.

THE CITY OF BIRMINGHAM,
A MUNICIPAL CORPORATION OF THE STATE OF ALABAMA,

Respondent.

APPLICATION FOR STAY OF EXECUTION AND ENFORCEMENT OF JUDGMENT AND SENTENCE

By virtue of Section 2101(b) of Title 28, U.S.C.A. Petitioner, Fred D. Shuttlesworth, in the above styled cause, respectfully makes application to your Honor: (a) To stay the execution and enforcement of the Judgment of this Court for ninety (90) days from the —— day of November, 1967, and (b) To recall from the Court of Appeals of Alabama, the certificate reversing and remanding the Judgment of that Court, to enable the petitioner to apply for and obtain, if he can, a review of said cause by the Supreme Court of the United States.

Petitioner further prays that execution and enforcement of said Judgment be stayed until the Supreme Court of the United States renders a final decision on the Petition for Certiorari, and if the same be granted,

until the Supreme Court of the United States shall render its final decision, affirming or reversing the aforesaid Judgment of the Supreme Court of Alabama.

In support of this application, petitioner shows unto Your Honors the following facts:

(1) Petitioner was tried and convicted of violation of Ordinance 1159 of the General City Code of Birmingham. Petitioner was sentenced to a term of ninety (90) days hard labor for the City of Birmingham, and a fine of Seventy-five ($75.00) Dollars.

[fol. 27] 2. Your petitioner appealed to the Court of Appeals of Alabama, which Court reversed the Judgment of the Circuit Court of Jefferson County, and rendered a Judgment discharging petitioner.

3. The City of Birmingham filed a Petition in this Court for Writ of Certiorari, to review and revise the Opinion and Judgment of the Court of Appeals, which Writ was granted.

4. Petitioner, both in the pleadings filed below, and on the trial of this cause, and in the petition for Certiorari in this Court, have raised several important questions of federal constitutional law, arising under the First and Fourteenth Amendments to the United States Constitution, but were decided adversely for petitioner.

5. That on final submission to this court the decision and judgment of the Court of Appeals of Alabama were reversed and rendered on November 9, 1967.

6. The Counsel for petitioner has informed him that several important questions of Federal Constitutional Law

were raised on his trial, and on application for Certiorari, to this Honorable Court, and petitioner has instructed counsel to seek a review of this cause by the United States Supreme Court. Counsel for petitioner is preparing an application for Writ of Certiorari to be filed in the United States Supreme Court, in order that the said Court may review said questions of Federal Constitutional Law, but that said petition and the record in this cause canot be prepared before this Honorable Court would otherwise issue its certificate of affirmance, and petitioner would be apprehended, fined and imprisoned, and that petitioner should not be fined and imprisoned before the Supreme Court of the United States has an opportunity to act on his petition for Writ of Certiorari.

7. Truth of the matters set out above, and the good faith of petitioner, in his avowal to seek review of this cause by the Supreme Court of the United States of America, is verified by the Affidavit of Counsel for petitioner.

ARTHUR D. SHORES
1527 Fifth Avenue, North
Birmingham, Alabama

ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

[fol. 28]

NORMAN C. AMAKER
JACK GREENBERG
10 Columbus Circle
New York, New York

By /s/ ARTHUR D. SHORES
Attorneys for Petitioner

VERIFICATION

STATE OF ALABAMA
JEFFERSON COUNTY

Personally appeared before me the undersigned authority for and in the said County and State, Arthur D. Shores, who is known to me, and who after being first duly sworn, says that he is counsel for the petitioner, in the above petition, and that the facts set forth therein are true to the best of his knowledge, information and belief, and that the above petition is filed for the purposes set forth therein, and not for the purpose of delay or harassment.

/s/ ARTHUR D. SHORES

Sworn to and subscribed before me
this 22nd day of November, 1967.

/s/ AGNES N. STUDEMIRE

NOTARY PUBLIC

[fol. 29]

Order Granting Stay

December 4, 1967

STATE OF ALABAMA ..... JUDICIAL DEPARTMENT

SUPREME COURT OF ALABAMA

OCTOBER TERM 1967-68

6th Div. 291

Ex Parte: City of Birmingham, a Municipal Corporation

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS
(Re: Fred L. Shuttlesworth v. City of Birmingham)

Jefferson Circuit Court

The respondent, Fred L. Shuttlesworth, in the above styled cause, having made application for suspension of sentence and said application being duly examined and understood by the Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Certificate of Reversal and Remandment to the Court of Appeals be recalled by the Clerk of the Supreme of Alabama.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the execution of the judgment of reversal is hereby stayed for ninety (90) days from the 4th day of December, 1967 to enable the respondent to apply for and obtain, if he can, a review of said cause by the Supreme Court of the United States.

[fol. 30] In the event the respondent does not apply to the Supreme Court of the United States for a Writ of Certiorari within ninety (90) days from the 4th day of December, 1967, the stay of execution of said judgment of reversal shall cease and terminate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the execution and enforcement of said judgment be further stayed in the event the respondent files a Petition for Certiorari in the Supreme Court of the United States to review said judgment of reversal and until the Supreme Court of the United States renders a final decision affirming or reversing the judgment of this Court.

I, J. O. Sentell, Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 4 day of Dec. 1967.

/s/ J. O. Sentell

Deputy Clerk Supreme Court of Alabama